118-148

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. ~~540~~. 249

THOMAS HOPPER, PLAINTIFF IN ERROR,

vs.

THE TOWN OF COVINGTON, INDIANA.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

FILED AUGUST 1, 1883.

SUPREME COURT OF THE UNITED STATES.

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JUDD & DETWEILER, PRINTERS, WASHINGTON.

1 Pleas of the circuit court of the United States for the district of Indiana, begun and holden at the United States court-house, in the city of Indianapolis, in said district, on the first Tuesday of November, in the year of our Lord one thousand eight hundred and eighty-one, before the Honorable Walter Q. Gresham, judge of the district court of the United States for said district, and *ex officio*, one of the judges of said circuit court.

THOMAS HOPPER
vs.
THE TOWN OF COVINGTON, INDIANA. } 6787. Civil Action.

Be it remembered that heretofore, to wit, at the November term of said court, on the 12th day of November, A. D. 1879, before the Honorable Walter Q. Gresham, *ex officio* one of the judges of said court, the plaintiff, by Messrs. McDonald and Butler, his solicitors, filed his complaint herein, in the words following, to wit:

Par. 1. The plaintiff, Thomas Hopper, a citizen and resident of the State of New York, complains of the defendant, The Town of Covington, Indiana, a municipal corporation duly and legally organized and existing under the laws of the State of Indiana, in
2 that behalf enacted, and says: That said defendant heretofore executed per certain bond No. 14, and attached thereto coupon No. 7, a copy of which said coupon is filed herewith and made part hereof, marked Exhibit "A," by the terms of which said coupon defendant promised to pay to the bearer thereof, on the 1st day of October, 1879, in the city of New York, eight dollars; that at the maturity of said coupon defendant wholly failed and refused to pay the same; that plaintiff is the holder of said coupon, and the same remains wholly due and unpaid, together with interest at the rate of seven per centum per annum, said coupon being payable in the State of Naw York.

Wherefore plaintiff prays judgment for $12.00.

EXHIBIT "A."

Coupon.

$8 COVINGTON, IND., *October 1st*, 1876.

One year after date The Town of Covington, Ind., will pay to the bearer, in the city of New York, eight dollars, being one year's interest on bond No. 14.

A. GISH, *Pres't.*

Attest: FRANK M. HICKS, *Clerk.*

3 Par 2. Further complaining of said defendant, plaintiff says: That heretofore said defendant executed her certain bond No. 21, and attached thereto coupon No. 6, a copy of which said coupon is filed herewith and made part hereof, marked Exhibit "B," by the terms of which said coupon defendant promised to pay to the bearer, on the 1st day of October, 1879, in the city of New York, forty dollars; that at the maturity of said coupon said defendant

wholly failed and refused to pay the same; that plaintiff is the bearer of said coupon, and the same remains wholly due and unpaid, together with interest thereon at seven per centum per annum, said coupon being payable in the State of New York.

Wherefore plaintiff prays judgment for $55.00.

EXHIBIT "B."

Coupon.

$40. COVINGTON, IND., *October 1st*, 1875.

One year after date the town of Covington, Ind., will pay to the bearer, in the city of New York, forty dollars, being one year's interest on bond No. 21.

A. GISH, *Pres't.*

Attest: FRANK M. HICKS, *Clerk.*

4 Par. 3. Plaintiff, further complaining of said defendant, says: That plaintiff is the bearer of 60 coupons, in all respects, except the numbers thereof, identical with the coupon, a copy of which is filed herewith and marked Exhibit A, the remaining 59 of which are numbered as follows, that is to say:

Bond	14,	No.	8;	bond	14,	No.	9;	bond	15,	No.	7.
"	15,	"	8;	"	15,	"	9;	"	16,	"	7.
"	16,	"	8;	"	16,	"	9;	"	17,	"	7.
"	17,	"	8;	"	17,	"	9;	"	18,	"	7.
"	18,	"	8;	"	18,	"	9;	"	19,	"	7.
"	19,	"	8;	"	19,	"	9;	"	20,	"	7.
"	20,	"	8;	"	20,	"	9;	"	21,	"	7.
"	21,	"	8;	"	21,	"	9;	"	22,	"	7.
"	22,	"	8;	"	22,	"	9;	"	23,	"	7.
"	23,	"	8;	"	23,	"	9;	"	24,	"	7.
"	24,	"	8;	"	24,	"	9;	"	25,	"	7.
"	25,	"	8;	"	25,	"	9;	"	36,	"	7.
"	36,	"	8;	"	36,	"	9;	"	37,	"	7.
"	37,	"	8;	"	37,	"	9;	"	38,	"	7.
"	38,	"	8;	"	38,	"	9;	"	39,	"	7.
"	39,	"	8;	"	39,	"	9;	"	40,	"	7.
"	40,	"	8;	"	40,	"	9;	"	41,	"	7.
"	41,	"	8;	"	41,	"	9;	"	42,	"	7.
"	42,	"	8;	"	42,	"	9;	"	43,	"	7.
"	43,	"	8;	"	42,	"	9;				

That he is the bearer of 74 coupons, in all respects, except the numbers thereof, identical with the coupon, a copy of which
5 is filed herewith and marked Exhibit "B," the remaining 73 of which are numbered as follows, that is to say:

Bond	No.	21,	Nos.	7,	8,	9;	bond	22,	Nos.	7,	8, 9.
"	"	23,	"	6,	7,	8, 9;	"	24,	"	6,	7, 8, 9.
"	"	25,	"	7,	8,	9;	"	26,	"	7,	8, 9.

Bond	No.	27,	Nos.	6,	7,	8,	9;	bond	28,	Nos.	6, 7, 8, 9.
"	"	29,	"		7,	8,	9;	"	30,	"	6, 7, 8, 9.
"	"	31,	"	6,	7,	8,	9;	"	32,	"	6, 7, 8, 9.
"	"	33,	"		7,	8,	9;	"	34,	"	6, 7, 8, 9.
"	"	35,	"	6,	7,	8,	9;	"	36,	"	7, 8, 9.
"	"	37,	"	6,	7,	8,	9;	"	38,	"	6, 7, 8, 9.
"	"	39,	"	6,	7,	8,	9;	"	40,	"	6, 7, 8, 9.

That each of said bonds hereinbefore set forth were executed by said defendant, and said coupons attached by her, by the terms of which said coupons defendant promised to pay, on the first day of October, 1879, to the bearer, in the city of New York, the several sums in said coupons denominated; that at the maturity of said coupons said defendant wholly failed and refused to pay all or any part thereof, and the same remain wholly due and unpaid, together with interest at the rate of seven per centum per annum, said coupons being payable in the State of New York. Wherefore plaintiff prays judgment for $4,723.00.

Wherefore and by reason of all the matters in complaint
6 set forth plaintiff prays judgment for $4,790, and all proper relief.

McDONALD & BUTLER,
Attorneys for Pl'tf.

INDIANAPOLIS, *Nov.* 10, 1879.

It is hereby agreed by and between the plaintiff and defendant in the above-entitled cause, in order to avoid a multiplicity of paragraphs in this complaint and obviate the necessity of setting out copies of each of the coupons, that this complaint shall be in all respects taken and considered, and this cause determined and judged, in the same manner as if each of the coupons named in paragraph 3 were set forth in a separate paragraph, and a copy of each of said coupons attached.

McDONALD & BUTLER,
Attorneys for Plaintiff.
TIPTON & WOOD &
THOS. F. DAVIDSON,
Att'ys for Def't.

And afterwards, to wit, at the May term of said court, on the 11th day of May, A. D. 1881, before the Honorable Walter Q. Gresham, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Comes now the defendant, by Samuel F. Wood and T. F.
7 Davidson, its attorneys, and files its demurrer to the complaint herein, in the words following, to wit:

The defendant, The Town of Covington, demurs to the complaint herein, and to each paragraph thereof separately, and shows to the court the following causes of demurrer thereto:

1st. That said complaint is insufficient in law to authorize plaintiff to maintain his action against the defendant.

2nd. That said complaint states no cause of action against the defendant.

3rd. That said complaint does not set out a copy of either of the bonds therein mentioned nor state their form and substance.

4. That said complaint does not allege that said bonds or their coupons were issued in pursuance of any law of the State of Indiana.

5th. That the complaint contains no allegation that the defendant was authorized to issue the bonds or the coupons sued on.

6. That no facts are stated showing under what authority the bonds mentioned or the coupons sued on were issued.

7th. That the authority or power of the defendant to issue the bonds mentioned, or the coupons thereof, in suit is not
8 averred and does not appear on the face of the coupons, and no copy of either of said bonds is filed, nor is any averment of their form and substance made.

8th. That the facts alleged are insufficient in law to constitute any cause of action against this defendant.

SAMUEL F. WOOD AND
THOS. F. DAVIDSON,
Att'ys for Defendant.

And afterwards, to wit, at the May term of said court, on the 13th day of October, A. D. 1881, before the Honorable Walter Q. Gresham, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

The court having considered the argument on the demurrer heretofore filed to the complaint, said demurrer is sustained, and the plaintiff, on his motion, has leave to amend.

And afterwards, to wit, at the November term of said court, on the 13th day of December, A. D. 1881, before the Honorable Walter Q. Gresham, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Comes now the plaintiff, by McDonald & Butler, his attorneys, and by leave of court files his amended bill of complaint
9 herein, in the words following, to wit:

The plaintiff, Thomas Hopper, a citizen and resident of the State of New York, for his amended complaint against The Town of Covington, Indiana, a municipal corporation duly organized under and by virtue of the laws of the State of Indiana in that behalf enacted, says: That heretofore, to wit, on the 1st day of October, 1870, the defendant, by its board of trustees, upon a petition to said board of trustees of the citizen owners of five-eight-s of the taxable property of said town of Covington, as evidenced by the assessment roll of the preceding year to contract said debt or loan, said petition having attached thereto an affidavit verifying the genuineness of the signatures to the same, executed its bonds num-ered, respectively, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 36, 37, 38, 39, 40, 41, 42, and 43, each for the sum of one hundred dollars, due in

ten years from date, with interest at eight per cent. per annum; to evidence which defendant attached to each of said bonds interest coupons, numbered from one to ten inclusive, dated, respectively, on the 1st day of October of the years 1870, 1871, 1872, 1873, 1874, 1875, 1876, 1877, 1878, and 1879, each coupon being payable
10 one year after its respective date, and calling for the interest sum of eight dollars; that at the same time, and as a part of the same issue, defendant in like manner executed its bonds numbered, respectively, 21, 23, 24, 27, 28, 30, 31, 32, 34, 35, 37, 38, 39, 40, 22, 25, 26, 29, 33, and 36, each for the sum of five hundred dollars, due in ten years from date, with interest at eight per cent. per annum, to evidence which defendant attached to each of said bonds ten interest coupons, respectively, of like numbers, dates, and maturities as the above-described coupons of the one hundred dollar bonds, each coupon calling for the interest sum of $40.00; that each of said bonds was identical in form with bond No. 21, a copy of which is attached hereto as Exhibit "A," except as to number and amount, the numbers and am'ts of respective bonds being as above set forth; that said bonds and coupons of defendant were placed upon the market and sold, and plaintiff became the purchaser of before maturity, and for a valuable consideration, and is the bearer and owner of the following coupons:

11

Coupons numbered respectively		7, 8, & 9	on bond No.	14.
"	"	7, 8, & 9	"	15.
"	"	7, 8, & 9	"	16.
"	"	7, 8, & 9	"	17.
"	"	7, 8, & 9	"	18.
"	"	7, 8, & 9	"	19.
"	"	7, 8, & 9	"	20.
"	"	7, 8, & 9	"	21.
"	"	7, 8, & 9	"	22.
"	"	7, 8, & 9	"	23.
"	"	7, 8, & 9	"	24.
"	"	7, 8, & 9	"	25.
"	"	7, 8, & 9	"	36.
"	"	7, 8, & 9	"	37.
"	"	7, 8, & 9	"	38.
"	"	7, 8, & 9	"	39.
"	"	7, 8, & 9	"	40.
"	"	7, 8, & 9	"	41.
"	"	7, 8, & 9	"	42.
"	"	7, 8, & 9	"	43.

That each of said coupons is identical in form with that of coupon No. 7, of bond No. 14, a copy of which is filed herewith as Exhibit "B," except only as to number and date of maturity, which are respectively as hereinbefore set forth; that plaintiff also became the purchaser, before maturity, and for a valuable consideration, and is the bearer and owner of the following coupons, to wit:

12	Coupons	numbered	respectively 6, 7, 8, & 9	on bond No. 21.
	"	"	7, 8, & 9	" 22.
	"	"	6, 7, 8, & 9	" 23.
	"	"	6, 7, 8, & 9	" 24.
	"	"	7, 8, & 9	" 26.
	"	"	6, 7, 8, & 9	" 27.
	"	"	6, 7, 8, & 9	" 28.
	"	"	7, 8, & 9	" 29.
	"	"	6, 7, 8, & 9	" 30.
	"	"	6, 7, 8, & 9	" 31.
	"	"	6, 7, 8, & 9	" 32.
	"	"	7, 8, & 9	" 33.
	"	"	6, 7, 8, & 9	" 34.
	"	"	6, 7, 8, & 9	" 35.
	"	"	7, 8, & 9	" 36.
	"	"	6, 7, 8, & 9	" 37.
	"	"	6, 7, 8, & 9	" 38.
	"	"	6, 7, 8, & 9	" 39.
	"	"	6, 7, 8, & 9	" 40.

That each of said last enumerated coupons is identical in form with coupon No. 6 on bond No. 21, a copy of which is attached hereto as Exhibit "C," except only as to numbers and dates of maturity, which are respectively as hereinbefore set forth; that by the terms of each of the said coupons, of which plaintiff is the owner, as hereinbefore alleged, defendant promised to pay the bearer, in the city of New York, the respective amounts called for in
13 said coupons, at the respective maturities thereof, to wit: For all coupons numbered "6," October 1st, 1876; for all coupons numbered "7," October 1st, 1877; for all coupons numbered "8," October 1st, 1878; for all coupons numbered "9," October 1st, 1879; that at the maturities of said coupons defendant wholly failed and refused to pay said coupons, and they and each of them are past due and unpaid, together with interest at the rate of seven per cent. per annum, said coupons being payable in the State of New York; wherefore plaintiff asks judgment for $6,000, and all other proper relief.

McDONALD & BUTLER,
Att'ys for Pl'ffs.

EXHIBIT "B."

Coupon.

$8.00. COVINGTON, IND., *October* 1*st*, 1876.

One year after date the town of Covington, Ind., will pay to the bearer, in the city of New York, eight dollars, being one year's interest on bond No. 14.

A. GISH, *Pres't.*

Attest: FRANK M. HICKS, *Clerk.*

EXHIBIT "C."

Coupon.

$40.00. COVINGTON, IND., *October 1st*, 1875.

14 One year after date the town of Covington, Ind., will pay to the bearer, in the city of New York, eight dollars, being one year's interest on bond No. 21.

A. GISH, *Pres'd't.*

Attest: FRANK M. HICKS, *Clerk.*

INDIANAPOLIS, *December 13th*, '81.

It is hereby agreed in the above cause, in order to avoid a multiplicity of paragraphs of complaints and of exhibits therein, that this complaint be taken and considered, and this cause determined and adjudicated in the same manner and to the same effect as if each of the coupons named in the above-amended complaint was set forth in a separate paragraph, and a copy of each of said coupons exhibited.

McDONALD & BUTLER,
Attorneys for Plaintiff.
THOS. F. DAVIDSON,
Att'ys for Def't.

And afterwards, to wit, at the November term of said court, on the 24th day of February, A. D. 1882, before the Honorable Walter Q Gresham, judge as aforesaid, the following further proceed-
15 ings in the above-entitled cause were had, to wit:

Comes now the plaintiff, by Messrs. McDonald and Butler, his attorneys, and files his amended and supplemental complaint herein, in the words following, to wit:

Par 1. The plaintiff, Thomas Hopper, who is a citizen of the State of New York, complains of the defendant, the Town of Covington, of the State of Indiana, which is a citizen of the State of Indiana, and says: That said defendant is a municipal corporation, organized and existing under and by virtue of the laws of the State of Indiana, with full power and authority pursuant to the laws of said State, to execute negotiable commercial paper; that pursuant to the laws of said State regulating the execution of such negotiable commercial obligations said defendant, on the first day of October, 1878, by its proper officers and agents, executed its negotiable commercial bond payable to bearer ten years after date, at the Farmers' Bank, in Covington, Indiana, which bank then was a bank of deposit and discount at said town of Covington, Indiana; that thereafter and before the maturity of said bond plaintiff purchased the same for a valuable consideration, and is still the owner thereof; a copy of said bond is filed herewith and hereby
16 part of this complaint marked Exhibit "A."

Plaintiff says he is the owner of nineteen other bonds of precisely like tenor and effect with said bond, Exhibit "A," except that said bouds are numbered respectively 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, and 40, and of twenty other

bonds of precisely like tenor and effect with said Exhibit "A," except only that said bonds are each for one hundred dollars, and are numbered respectively 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 36, 37, 38, 39, 40, 41, 42, and 43, and that he purchased each and all of said bonds before maturity, for a valuable consideration. Plaintiff says that said bond, Exhibit "A," and each of said other bonds is past due and wholly unpaid, wherefore plointiff prays judgment for twenty thousand dollars against said defendant, and for all proper relief.

Par. 2. The plaintiff, Thomas Hopper, who is a citizen of the State of New York, complains of the defendant, the Town of Covington, of the State of Indiana, which is a citizen of the State of Indiana, and says:

That said defendant is a municipal corporation, organized and existing under and by virtue of the laws of the State of Indiana,
17 with full power and authority pursuant to the laws of said State to execute negotiable commercial paper. That pursuant to the laws of said State regulating the execution of such negotiable commercial obligations, said defendant on the 1st day of October, 1870, by its proper officers and agents, executed its negotiable commercial bond payable to bearer ten years after date, at the Farmers' Bank in Covington, Indiana, which bank then was a bank of deposit and discount at said town of Covington, Indiana (a copy of said bond is hereto attached and hereby made part hereof, marked Exhibit "A"; that [at] the time of executing said bond defendant executed and attached thereto a certain interest warrant or coupon for the sum of forty dollars, dated October 1st, 1879, payable one year after date to bearer, in the city of New York; that afterwards, and before the maturity of said interest coupon, plaintiff, for a valuable consideration, purchased the same, and is still the owner thereof. A copy of said coupon or interest warrant is hereto attached and hereby made part hereof, marked Exhibit "B;" that plaintiff is the owner of seventy-nine other coupons of like tenor and effect taken from like bonds, all executed by defendant as aforesaid, except only that said coupons are from bonds of number 21 to 40, both inclusive,
18 and that 19 of said coupons bear date October 1, 1879; 20 bear date October 1, 1878; 20 bear date October 1, 1877, and 20 bear date October 1, 1876; and plaintiff is also the owner of 80 other coupons of like tenor and effect, except only that said other coupons are from bonds of $100.00 each, and numbered 14 to 25, both inclusive, and 36 to 43, both inclusive, and are each for $8.00, and 20 of said coupons bear date October 1, 1879; 20 bear date October 1, 1878; 20 bear date October 1, 1877; and 20 bear date October 1, 1876; all of which coupons were purchased by plaintiff for a valuable consideration, before maturity, and are still held by him.

Plaintiff says that said coupon, Exhibit "B," and each of said other coupons is past due and wholly unpaid.

Wherefore plaintiff prays judgment for ten thousand dollars against said defendant, and for all proper relief.

McDONALD & BUTLER,
Att'ys for Plaintiff.

EXHIBIT "A."

No. 21. United States of America. $500.

The town of Covington, State of Indiana, will pay ten years
19 after date to the bearer five hundred dollars, with interest at eight per cent. per annum, the interest payable as designated by coupons hereto attached, and the principal upon presentation of the bond when the same shall have become due. This bond shall be payable after five years from the date hereof, at the option of the town of Covington. Payable at the Farmers' Bank, in Covington, Indiana. Each coupon attached shall be *prima facie* evidence of payment of the accrued interest.

In witness whereof, the corporation seal of said town is hereto affixed, and this bond is signed by the president of this board of trustees and attested by the clerk thereof, this first day of October, A. D. 1870.

[SEAL.] (Signed) A. GISH, *President.*

Attest:
FRANK M. HICKS, *Clerk.*

EXHIBIT "B."

Coupon.

$40. COVINGTON, IND., *October 1st*, 1879.

One year after date the Town of Covington, Ind., will pay to the bearer, in the city of New York, forty dollars, being one year's interest on bond No. 21.

A. GISH, *Pres't.*

Attest:
FRANK M. HICKS, *Clerk.*

20 In the Circuit Court of the United States for the District of Indiana.

THOMAS HOPPER
vs.
THE TOWN OF COVINGTON, of the State of Indiana.

It is hereby agreed that the annexed and foregoing paragraphs of complaint may be filed as an amended and supplemental complaint, all objections on account of the obligations sued on having matured after this suit was begun being hereby expressly waived. It is further agreed that said complaint shall be treated and construed in all respects as if a separate paragraph of complaint were filed on each of said coupons therein mentioned containing similar averments to those of the second paragraph of complaint; this agreement being made to save unnecessary repetition of averments substantially the same, and defendant hereby enters its full appearance to this amended and supplemental complaint, reserving and saving all rights and grounds of objection to the sufficiency of the complaint.

THOS. F. DAVIDSON,
Of Counsel for Def't.

And afterwards, to wit, at the November term of said court,
21 on the 2nd day of March, A. D. 1882, before the Honorable Walter Q. Gresham, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Come the parties, the plaintiff by Messrs. McDonald & Butler, his attorneys, and the defendant by T. F. Davidson, Esq., and Messrs. Claypool & Ketcham, its attorneys, and thereupon the plaintiff withdraws his amended complaint filed herein on the 13th day of December, 1881; and the defendant now files its demurrer to the amended and supplemental complaint of the plaintiff, filed herein on the 24th day of February, 1882, and said demurrer is in the words following, to wit:

The defendant, The Town of Covington, demurs to the plaintiff's amended complaint, filed Feb'y 24th, 1882, and to each paragraph thereof separately, and for the following reasons and causes:

1. That said complaint is insufficient in law to authorize the plaintiff to maintain his action.

2. That said complaint does not allege under what law or for what purpose the bonds and coupons sued on were issued.

22 3. That said complaint contains no allegation showing authority in defendant to make the bonds and coupons sued upon.

4. The said complaint states no cause of action against the defendant.

5. That the allegation in said complaint of power and authority in defendant to make the bonds and coupons in suit is an averment of a legal conclusion.

6. That said complaint does not state facts sufficient to constitute a cause of action against the defendant.

THOS. F. DAVIDSON,
Of Counsel for The Town of Covington.

And thereupon the court having heard argument of counsel, and being sufficiently advised in the premises doth sustain said demurrrer, to which ruling of the court the plaintiff, by his attorneys now here, excepts. And now the plaintiff failing and refusing to further amend his complaint herein, and electing to stand by said complaint, thereupon the defendant, by its attorneys, moves the court for judgment herein, which motion the court doth sustain.

It is therefore considered by the court that the plaintiff take nothing by his action herein, and that the defendant recover of said plaintiff its costs and charges herein expended, taxed at $——.

23 And afterwards, to wit, at the May term of said court, on the 4th day of June, A. D. 1883, before the Honorable William A. Woods, judge of the district court of the United States for the district of Indiana, and *ex officio* judge of said circuit court, the following further proceedings in the above-entitled cause were had, to wit:

Comes now the plaintiff, Thomas Hopper, by Messrs. McDonald, Butler and Mason, his attorneys, and prays the court for a writ of

error to the Supreme Court, which is allowed upon his filing the proper bond in the penalty of one hundred dollars, with surety to be approved by the court.

And afterwards, to wit, at the May term of said court, on the 6th day of June, A. D. 1883, before the Honorable William A. Woods, judge as aforesaid of said court, the following further proceedings in the above-entitled cause were had, to wit:

Comes now the plaintiff, by counsel, and files his bond herein, which is approved by the court; and said bond is in the words following, to wit:

Supreme Court of the United States.

THOMAS HOPPER *vs.* THE TOWN OF COVINGTON.

24 Know all men by these presents that we, Joseph E. McDonald, John M. Butler, and Augustus L. Mason, are held and firmly bound unto the above-named The Town of Covington, Indiana, in the sum of one hundred dollars, to be paid to the said town of Covington, to which payment, well and truly to be made, we bind ourselves jointly and severally, and our and each of our heirs, executors, and administrators, jointly by these presents.

Sealed with our seals and dated this 6th day of June, 1883.

Whereas the above-named Thomas Hopper hath prosecuted his writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the circuit court of the United States for the district of Indiana: Now, therefore, the condition of this obligation is that if the above-named Thomas Hopper shall prosecute his said appeal to effect, and answer all costs and damages that may be adjudged or awarded against him if he shall fail to make good his plea, then this obligation to be void; otherwise in full force.

[SEAL.] J. E. McDONALD.
[SEAL.] JOHN M. BUTLER.
[SEAL.] AUGUSTUS L. MASON.

Taken and approved this 6th day of June, 1883.

W. A. WOODS, *Judge.*

25 DISTRICT OF INDIANA:

I, Noble C. Butler, clerk of the circuit court of the United States for the district of Indiana, do hereby certify that the above and foregoing is a full, true, and complete transcript of the record and proceedings in the cause entitled "Thomas Hopper *vs.* The Town of Covington, Indiana," as the same now appears in my office.

Witness my hand and the seal of said court, this 11th day of June, A. D. 1883.

[SEAL.] NOBLE C. BUTLER, *Clerk.*

DISTRICT OF INDIANA:

I, William A. Woods, judge of the district court of the United

States for said district, do certify that at the date of the foregoing certificate Noble C. Butler was, and now is, the clerk of the circuit court of the United States for said district, and that his attestation aforesaid is in due form of law.

Witness my hand, this 11th day of June, 1883.

W. A. WOODS, *Judge.*

26 UNITED STATES OF AMERICA:

The President of the United States of America to the judges of the circuit court of the United States for the 7th judicial circuit and district of Indiana, Greeting:

Because on the record and proceedings, as also on the rendition of a judgment in a plea which is in said circuit court, before you, between Thomas Hopper and The Town of Covington, Indiana, a manifest error hath happened, to the great damage of the said Thomas Hopper, as by his complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid on this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 8th day of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court, this 4th day of June, A. D. 1883.

[SEAL.] NOBLE C. BUTLER, *Clerk.*

27 United States of America to The Town of Covington, Indiana, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the 2d Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Indiana, wherein Thomas Hopper is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable William A. Woods, judge of the said circuit court, this 4th day of June, in the year of our Lord one thousand eight hundred and eighty-three.

[SEAL.] W. A. WOODS.

28 I hereby acknowledge service of the within citation and receipt of copy thereof, this 9th day of June, 1883.

THOS. F. DAVIDSON,

Attorney of Record for Defendant, Town of Covington.

29 *Assignment of Errors.*

In the Supreme Court of the United States.

THOMAS HOPPER *vs.* THE TOWN OF COVINGTON.

The plaintiff in error says that there is manifest error in the above and foregoing cause, as appears in the record of the proceedings therein, in this, to wit:

1. The court erred — sustaining defendant's demurrer to plaintiff's complaint, to which ruling the plaintiff at the time excepted.

2. The court erred in sustaining defendant's demurrer to plaintiff's amended complained, to which ruling defendant at the time excepted.

3. The court erred in rendering judgment for defendant, to which plaintiff at the time excepted.

McDONALD & BUTLER,
Att'ys for Pl'ff in Error.

30 [Endorsed:] No. —. In the Supreme Court of the United States. Thomas Hopper *v.* The Town of Covington, Indiana. Error to circuit court for district of Indiana. Transcript and assignment of errors. McDonald & Butler, Indianapolis, Ind., att'ys for pl'ff in error.

Endorsed on cover: Indiana C. C. U. S. No. 540. Thomas Hopper, plaintiff in error, *vs.* The Town of Covington, Indiana. Filed 1st August, 1883.

118-148

IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1885.

THOMAS HOPPER, PLAINTIFF IN ERROR,
vs.
THE TOWN OF COVINGTON, INDIANA.

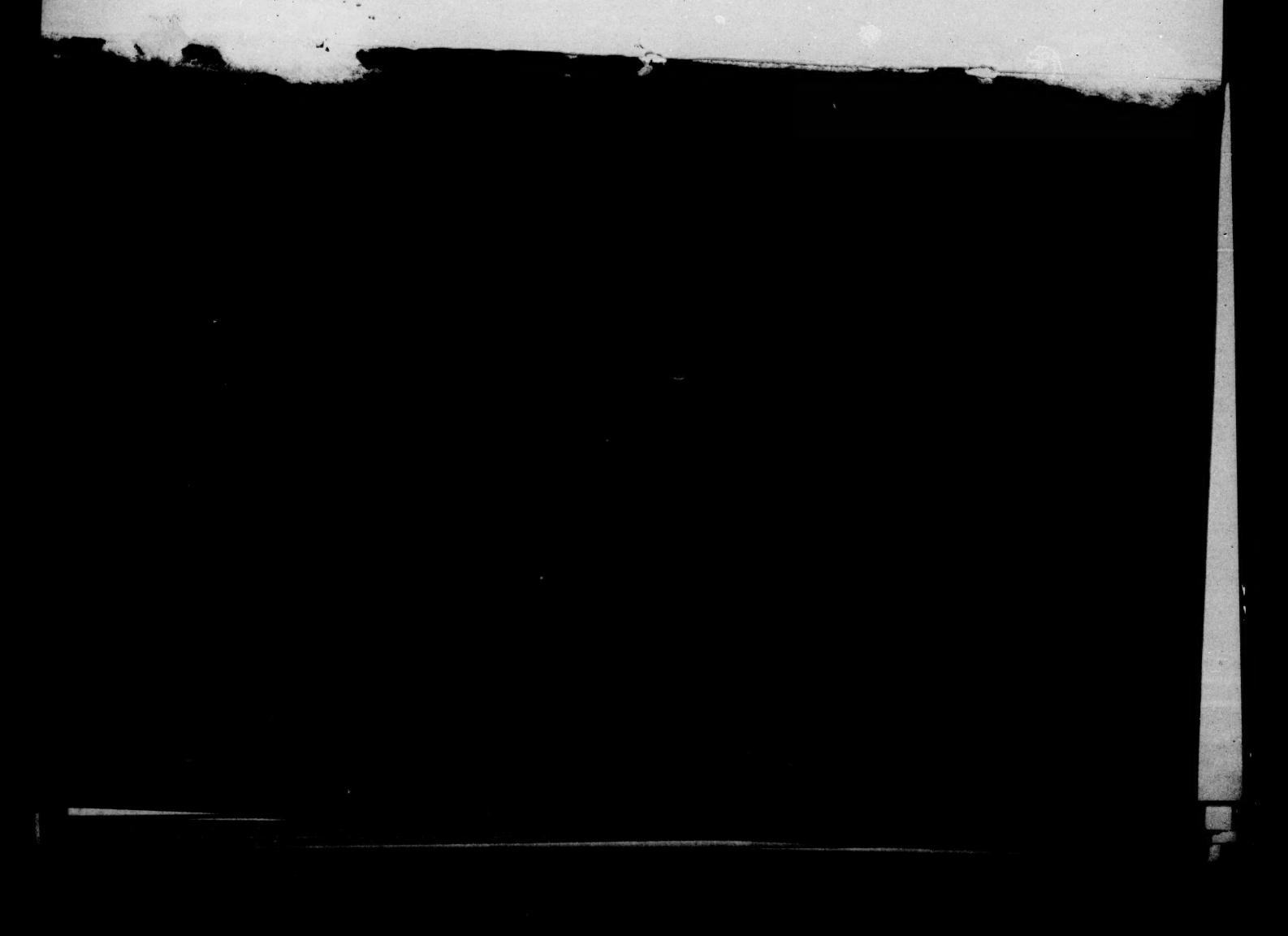
No. 249.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

BRIEF IN BEHALF OF DEFENDANT IN ERROR.

BY JOHN M. BUTLER.

FRANK H. SMITH, PRINT., INDIANAPOLIS



IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTORER TERM, 1885.

THOMAS HOPPER, PLAINTIFF IN ERROR,
vs.
THE TOWN OF COVINGTON, INDIANA.

No. 249.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

BRIEF IN BEHALF OF PLAINTIFF IN ERROR.

STATEMENT.

This case involves Twelve Thousand Dollars par value of municipal bonds issued by the Town of Covington, Indiana, together with defaulted interest coupons for the four years next preceding the maturity of the bonds.

On October 1, A. D., 1870, the Town of Covington, Indiana,—a municipal corporation existing under and by virtue of the statutes of the State of Indiana,—issued

two series of municipal bonds, each bond of one series being for Five Hundred Dollars, and each bond of the other series being for One Hundred Dollars. All these bonds were to bear eight per cent. interest, the interest being payable annually, and being evidenced by proper interest coupons attached to said bonds.

The bonds and coupons of both series are identical in tenor and effect, differing only as to number and amount,—the several coupons also differing as to date, —and are in form as follows, to wit:

"No.—— United States of America. $——

The Town of Covington, State of Indiana, will pay ten years after date to the bearer Five Hundred Dollars, with interest at eight per cent. per annum, the interest payable as designated by coupons hereto attached, and the principal upon presentation of the bond when the same shall have become due. This bond shall be payable after five years from the date hereof at the option of The Town of Covington, Payable at the Farmers' Bank, in Covington, Indiana. Each coupon attached shall be *prima facie* evidence of payment of the accrued interest.

In witness whereof, the corporation seal of said Town is hereto affixed, and this bond is signed by the President of this Board of Trustees and attested by the Clerk thereof, this first day of October, A. D. 1870.

(seal) (signed) A. GISH, *President.*

Attest: FRANK M. HICKS, *Clerk.*"

"Coupon.

$—— Covington, Ind., October 1st, 1879.

One year after date the Town of Covington, Ind. will pay to bearer, in the City of New York, Forty Dollars, being one years interest on bond No.————

A. GISH, *Pres't.*

Attest: FRANK M. HICKS, *Clerk.*"

The interest coupons maturing on these bonds from the date of their issue to October 1, 1877, were paid. On October 1, 1877, the Town of Covington defaulted in payment of interest, and has paid no interest since that date. The principal of the bonds became due October 1, 1880, and remains unpaid.

The Town of Covington was incorporated under the general statue of the State of Indiana entitled, "An act for the incorporation of Towns, defining their powers, providing for the election of officers thereof, and declaring their duties." Approved June 11, 1852, and amendments thereto.

This statute, as in force when these bonds were issued, conferred upon incorporated Towns the following, among other powers, viz:

"Sec. XXII. The board of trustees shall have the following powers, viz:

First: To have a common seal, and alter the same.

Second: To purchase, hold or convey any estate, real or personal, for the use of the corporation, so far as such purchase may be necessary to carry out the objects contemplated by this act.

Third: To organize fire companies, hook and ladder companies, to regulate their government, and the times and manner of their exercise: to provide all necessary apparatus for the extinguishment of fires; * * * to construct and preserve reservoirs, wells, pumps, and other water works, and to regulate the use thereof, and generally to establish other measures of prudence for the prevention or extinguishment of fires, as they shall deem proper. * * * * * * *

Eighth. To establish and regulate markets, and build market houses, and direct the location of slaughter houses.

Ninth. To lay out, open, grade and otherwise im-

prove the streets, alleys, sewers, side-walks and crossings, and keep them in repair, and to vacate the same.
* * * * * * * * * *

Twelfth. To insure the public property of such Town.

Thirteenth. To purchase, lay out and regulate cemeteries. * * * * * * * * *

Fifteenth. To levy and collect annual taxes, not exceeding fifty cents on the hundred dollars valuation, and twenty-five cents poll tax, on all property subject by law to taxation.
* * * * * * * * * * *

Seventeenth. Such board of trustees shall have power to complete school-houses now in progress of erection, and to provide for the payment of the same; to erect or provide such school-houses as may be necessary for the use of the schools of the town, to keep them in repair, and to provide fuel and other necessaries therefor.

Eighteenth. To construct all necessary wharves and landings for steamboats and other vessels, where such Town is situated on the banks of any navigable stream or water course.

Nineteenth. Said board of trustees shall have power to levy and collect annual taxes, not exceeding thirty cents on the hundred dollars valuation, on all property subject by law to taxation, for the support of Town schools within their said corporation.

Sec. XXVII. No incorporated Town under this act shall have power to borrow money or incur any debt or liability, unless the citizen owners of five-eights of the taxable property of such Town, as evidenced by the assessment roll of the preceding year, petition the board of trustees to contract such debt or loan, and such petition shall have attached thereto an affidavit verifying the genuineness of the signatures to the same; and for any debt created thereby, the trustees shall add to the tax duplicate of each year successively a levy sufficient to pay the annual interest on such debt or loan, with an addition of not less than five cents on the hundred dollars to create a sinking fund for the liquidation of the principal thereof."

Statutes of Indiana (Gavin & Hord) Vol. 1, pages 623–626

On May 15, 1869, an additional act was passed and approved, giving to incorporated Towns additional power touching the purchase of grounds and erection of buildings for school purposes and the levying of special taxes,–not to exceed fifty cents on each hundred dollars of taxable property,–to pay indebtedness contracted for such school purposes. This act also was in force when the bonds in suit were issued. The first section of this act is in the words following, viz :–

"Section 1. That any city or incorporated town in this state which shall, by the action of its school trustee or trustees, have purchased any ground and building, or buildings, or may hereafter purchase any ground and building or buildings, or have commenced, or may hereafter commence the erection of any building or buildings for school purposes, or which shall have, by its school trustee or trustees, contracted any debts for the erection of such building or buildings, or the purchase of such ground and building or buildings, and such trustee or trustees shall not have the necessary means with which to complete such building or buildings, or to pay for the purchase of such ground and building or buildings or pay such debt, may, on the filing by the school trustee or trustees of said city or incorporated town, of a report under oath, with the common council of such city, or the board of trustees of such incorporated town, showing the estimated or actual cost of any such ground and building or buildings, or the amount required to complete such building or buildings, or purchase such ground and building or buildings, or the amount of such debt, on the passage of an ordinance authorizing the same, by the common council of said city, or the board of trustees of such incorporated town, issue the bonds of such city or town to an amount not exceeding in the aggregate thirty thousand dollars, in denomination not less than one hundred nor more than one thousand dollars, and payable at any place designated in the bonds, the principal in not less than one year nor more than twenty years after the date of such bonds, and the interest annually or semi-annually,

as may be therein provided, to provide the means with which to complete such building or buildings, or to pay for the purchase of such ground and building or buildings, and to pay such debt; and such common council, or board of trustees, may, from time to time, negotiate and sell as many of such bonds as may be necessary for such purpose in any place, and for the best price that can be obtained therefor in cash; *Provided*, That such bonds shall not be sold at a price less than ninety-four cents on the dollar."

Statutes of Indiana (Davis' Supplement), vol. 3, p. 115.

The original declaration was filed before the principal of the bonds became due, and was based upon defaulted coupons. It is in three paragraphs. The first paragraph is based upon a defaulted coupon from a bond of the one hundred dollar series of bonds. The second paragraph is based upon a defaulted coupon from a bond of the five hundred dollar series of bonds. The third paragraph declares upon all of the other defaulted coupons held by plaintiff in error upon both series of bonds.

(Record pp. 1–3 inclusive).

The material averments of the original declaration are as follows, viz:

"The plaintiff, Thomas Hopper, a citizen and resident of the State of New York, complains of the defendant, The Town of Covington, Indiana, a municipal corporation duly and legally organized and existing under the laws of the State of Indiana in that behalf enacted, and says: That said defendant heretofore executed her certain bond No. —— and attached thereto coupon No. —— a copy of which coupon is filed herewith and made a part hereof, marked Exhibit "A," by the terms of which said coupon defendant promised to pay to the bearer thereof on the first day of October,

187–, in the City of New York, ——— ——— dollars; that at the maturity of said coupon, defendant wholly failed and refused to pay the same; that plaintiff is the holder of said coupon, and the same remains wholly due and unpaid," &c. (Record p. 1).

The Court sustained defendant's demurrer to the original declaration and granted plaintiff leave to amend. (Record p. 4).

Plaintiff filed an amended declaration, which appears in the record on pages 4 to 7. This amended declaration was afterwards withdrawn, and needs no further notice. (Record p. 10).

On February 24, 1882, plaintiff filed his amended and supplemental declaration upon which the case was finally heard and determined. This amended and supplemental declaration is in two paragraphs. The material averments of the first paragraph are as follows, namely:

"The plaintiff, Thomas Hopper, who is a citizen of the State of New York, complains of the defendant, The Town of Covington, of the State of Indiana, which is a citizen of the State of Indiana, and says: That said defendant is a municipal corporation, organized and existing under and by virtue of the laws of the State of Indiana, with full power and authority pursuant to the laws of said State to execute negotiable commercial paper; that pursuant to the laws of said State regulating the execution of such negotiable commercial obligations said defendant, on the first day of October, 1870, (by error in the printing of the record this date is made to appear 1878 instead of 1870) by its proper

officers and agents, executed its negotiable commercial bond, payable ten years after date, at the Farmer's Bank in Covington, Indiana, which bank then was a bank of deposit and discount at said Town of Covington, Indiana; that thereafter, and before the maturity of said bond, plaintiff purchased the same for a valuable consideration, and is still the owner thereof; a copy of said bond is filed herewith and hereby made a part of this complaint, marked Exhibit 'A.' "

This first paragraph then proceeds to declare upon all the other bonds held by plaintiff, giving the numbers and description of the different bonds so held.

The material averments of the second paragraph of the amended and supplemental declaration are as follows, viz:

"The plaintiff, Thomas Hopper, who is a citizen of the State of New York, complains of the defendant, The Town of Covington, of the State of Indiana, which is a citizen of the State of Indiana, and says: That said defendant is a municipal corporation, organized and existing under and by virtue of the laws of the State of Indiana, with full power and authority pursuant to the laws of said State to execute negotiable commercial paper; that pursuant to the laws of said State regulating the execution of such negotiable commercial obligations, said defendant on the first day of October, 1870, by its proper officers and agents, executed its negotiable commercial bond, payable to bearer ten years after date, at the Farmers' Bank in Covington, Indiana, which Bank then was a Bank of deposit and discount at said Town of Covington, Indiana; a copy of said bond is hereto

attached and hereby made part hereof, marked Exhibit "A;" that at the time of executing said bond defendant executed and attached thereto a certain interest warrant or coupon for the sum of————————Dollars, dated October 1st, 187—, payable one year after date to bearer, in the City of New York; that afterwards, and before the maturity of said interest coupon, plaintiff, for a valuable consideration, purchased the same, and is still the owner thereof. A copy of said coupon or interest warrant is hereto attached and hereby made part hereof, marked Exhibit "B;" which said coupon remains due and unpaid. (Record p. 8.)

This paragraph then proceeds to declare upon all the other coupons held by plaintiff, giving the numbers and description and date of the several different coupons so held by plaintiff.

By stipulation signed by defendant's counsel a multiplicity of paragraphs is avoided. (Record p. 9.)

To this amended and supplemental declaration defendant filed demurrer. The Court sustained defendant's demurrer and,—the plaintiff failing and refusing to further amend,—rendered judgment in favor of defendant.

From the judgment so rendered plaintiff prosecutes this writ of error. (Record pp. 10, 11.)

The errors assigned are as follows, viz:

"1. The Court erred in sustaining defendant's demurrer to plaintiff's complaint, to which ruling the plaintiff at the time excepted.

2. The Court erred in sustaining defendant's de-

murer to plaintiff's amended complaint, to which ruling defendant at the time excepted.

3. The Court erred in rendering judgment for defendant, to which ruling plaintiff at the time excepted." (Record p. 13).

ARGUMENT.

That the rulings complained of are erroneous will appear from consideration of the following propositions and authorities cited in their support.

I

INCORPORATED TOWNS, AS MUNICIPAL CORPORATIONS OF THE STATE OF INDIANA, ARE EMPOWERED BY LAW TO ISSUE COMMERCIAL OBLIGATIONS FOR SOME PURPOSES.

In view of the two statutes above quoted this proposition could scarcely be questioned, if it were supported by no other authority than the statutes of the State of Indiana.

By the statute first above quoted, which is the incorporating act, it was clearly the intention of the legislature to grant unto towns incorporated under that act the power to contract indebtedness. The powers conferred as above quoted from that act clearly and necessarily imply the power to contract indebtdeness for the various purposes in said powers expressed.

By the 27th section of that act it is provided that incorporated towns shall not have power to borrow money or incur any debt or liability except upon the petition of the citizen owners of five-eighths of the taxable property. This provision by necessary implica-

tion gives the right to incorporated towns to incur liability upon the performance of the condition precedent expressed in the section, and the power to borrow money, create indebtedness and incur liability, carries with it the power to issue commercial obligations to secure the payment of indebtedness so incurred.

By the second statute above quoted—the act of May 15, 1869—the power to issue commercial obligations in the shape of bonds is clearly and explicitly conferred upon incorporated towns.

But we are not without explicit authority in support of this proposition. The Supreme Court of the State of Indiana in passing upon section 27 of the incorporating act above quoted, in the case of *Second National Bank of New Albany* v. *the Town of Danville*, 60 Ind., 504, used the following language on page 509:

"It (a fire engine) might be purchased by parol, and in this case, on credit, and notes, *commercial or otherwise*, might be executed for the price by the board of trustees of the town," citing numerous authorities in support of such ruling.

Again, "It is decided in *Smith* v. *the City of Madison*, 7 Ind., 86, that municipal charters are to be so construed 'as to carry into effect every power clearly intended to be conferred and every power necessary to be implied for the complete exercise of the powers granted.'

"And in *New England, etc. Co.* v. *Robinson*, 25 Ind., 536, it is decided that 'corporations, along with the express and substantive powers conferred by their charter, take by implication all the reasonable modes of executing such powers which a natural person may adopt in the exercise of similar powers.' * *

"It is a power incident to corporations to borrow money to meet a debt, when necessary and proper. Angell & Ames Corporations, sec. 257; *The Board, etc.* v. *Day*, 19 Ind.. 450. * * *

"In *Mills* v. *Gleason*, 11 Wis., 470, it is decided that, 'when the charter of a municipal confers the power to purchase fire apparatus, cemetery grounds, to establish markets, and do many other things, for the execution of which money would be a necessary means; it would, in the absence of any positive restriction, confer the power to borrow money as an incident to the execution of these general powers."

Miller v. *The Board of Commissioners of Dearborn County, et al.*, 66 Ind., 162.

If incorporated Towns in the State of Indiana have the power to issue commercial obligations, such obligations, when issued, are legitimate commercial paper, the commercial character of which as to third party *bona fide* holders cannot be made to depend upon an examination of the records of the Town issuing such obligations, for the purpose of determining whether all the requisites of the law granting the power have been properly performed.

As far back as 1860 the Supreme Court of the State of Indiana, in discussing and deciding upon the powers of municipal corporations in said State, held that "the power to borrow money, necessarily implies the power to determine the time of payment, and also the power to issue bonds, or other evidences of indebtedness. * * * We think the common coun-

cil, having the power to borrow money, had the power to issue bonds therefor, payable in New York."

Evansville, etc., R. R. Co. v. *The City of Evansville*, 15 Ind. 412, 413.

"Express power to a municipal corporation to borrow money includes the power to issue its negotiable bonds, or other usual securities, to the lender."

1 Dillon on Municipal Corporations, Sec. 83.

It would be singular, anomalous in fact, to hold that a municipal corporation may issue commercial obligations, the assignment of which cuts off defences, and yet say to all *bona fide* third parties as holders and owners thereof, "You cannot buy these commercial obligations with safety unless you first know that there are no defences, that the money has been actually lent to and received by the City for some proper, lawful municipal purpose, you are not at liberty from the form of the commercial obligation to infer these facts. There is no presumption of law in favor of these obligations on which you may rely." Of what value would the commercial (?) character of such paper be? Obligations of this character have been uniformly recognized by this Court and by all the Courts of the country as having in fact, as well as in name, all the qualities of commercial paper.

"Bonds and coupons like these, by universal commercial usage, have all the qualities of commercial paper."

Gelpcke v. *Dubuque*, 1 Wall. 206.

"This species of bonds is a modern invention, intended to pass by manual delivery, and to have the

qualities of negotiable paper; and their value depends mainly upon this character. * * *

"That these securities are treated as negotiable by the commercial usages of the whole civilized world, and have received the sanctions of judicial recognition, not only in this Court, but of nearly every State in the Union, is well known and admitted."

Mercer County v. *Hacket*, 1 Wall. 95.

To same effect see

Ackley School District v. *Hall*, 113 U. S. 140.
Manufacturing Co., v. *Bradley*, 105 U. S. 180.
Rogers v. *Burlington*, 3 Wall. 666.

"Bonds of the kind executed by a municipal corporation to aid in the construction of a railroad, if issued in pursuance of a power conferred by the Legislature, are valid commercial instruments, and, if purchased for value in the usual course of business before they are due, give the holder a good title, free of prior equities between antecedent parties, to the same extent as in case of bills of exchange and promissory notes."

Commissioner, etc. v. *Clark*, 94 U. S. 287.

It seems clear, then, that there is Legislative authority, sanctioned by repeated judicial decision, for the issuing of commercial obligations by Towns incorporated under the statutes of the State of Indiana.

II.

IT IS A PRESUMPTION OF LAW THAT PUBLIC OFFICERS ACT IN ACCORDANCE WITH AND NOT CONTRARY TO LAW.

It was assumed by defendant's counsel in the Court below that Town officers are mere agents. Indeed, it

was asserted that the officers of a municipal corporation are mere agents with defined and limited powers.

Agents they certainly are, *mere* agents they certainly are not with reference to such bonds as these in suit, for not merely are they the agents to execute the bonds, but they are as well *the tribunal* vested with power to determine as to whether they may rightfully issue the bonds.

In this very fact is found the broad distinction between the execution of these bonds by the proper Town officers, and the execution of a bond by a *mere agent*. The admissions and recitals made by an ordinary agent in the execution of an obligation would be wholly inadmissible to establish his authority to execute the obligation. Yet the holding of this Court is uniform that recitals in municipal bonds as to the performance of conditions precedent are not only admissible, but are *conclusive* evidence of the authority to issue such bonds–wherever such authority may exist at all–and this even when the recitals are of the most general character, as that the bonds are issued "according to", or "pursuant to", or "by authority of", a certain act. Such recitals are held to be a decision, or conclusive evidence of a decision, by *the tribunal*, whose decision is *final* wherever the interests of *bona fide* third parties are concerned.

The question then arises, have *bona fide* third parties a right to rely upon the *acts of the Town officers*, as well as upon recitals in the bonds, as evidencing the decision they have made with reference to the performance of the conditions under which they might lawfully issue the bonds.

The case of *Martin* v. *Mott*, 12 Wheaton. 19, is an

instructive one upon this point. The action was replevin. The defence was seizure of the goods to satisfy a fine and forfeiture imposed by a Court Martial for refusal to to serve as a militiaman when thereunto required by the President in pursuance of the act of February 28, 1795. To this there was a demurrer. The act provided that "whenever the United States shall be invaded, or be in imminent danger of invasion from any foreign nation or Indian tribe, it shall be lawful for the President of the United States to call forth such number of the militia of the State or States most convenient to the place of danger, or scene of action, as he may judge necessary to repel such invasion, and to issue his order for that purpose to such officer or officers of the militia as he shall think proper."

This Court held that the President was the exclusive judge of the emergency, just as the town officers are held to be exclusive judges of the existence of the facts authorizing them to issue municipal bonds. But it was insisted there in argument that while the President was the judge of the emergency, yet the emergency must be alleged to exist.

On page 32 the following discussion of that point occurs:

"But it is now contended, as it was contended in that case, that notwithstanding the judgment of the President is conclusive as to the existence of the exigency, and may be given in evidence as conclusive proof thereof, yet that the avowry is fatally defective, because it omits to aver that the fact did exist. The argument is, that the power confided to the President is a limited

power, and can be exercised only in the cases pointed out in the statute, and therefore it is necessary to aver the facts which bring the exercise within the purview of the statute. In short, the same principles are sought to be applied to the delegation and exercise of this power entrusted to the executive of the nation for great political purposes, as might be applied to the humblest officer in the government, acting upon the most narrow and special authority. It is the opinion of the court, that this objection cannot be maintained. When the President exercises an authority confided to him by law, *the presumption is, that it is exercised in pursuance of law. Every public officer is presumed to act in obedience to his duty, until the contrary is shown; and a fortiori;* this presumption ought to be favorably applied to the chief magistrate of the union. It is not necessary to aver, that the act which he may rightfully do, was so done."

This presumption of law for which we are contending, is referred to, admitted to exist, and sanctioned by this Court in the case of " *Coloma* v. *Eaves*," 92 U. S., 490, where it is said, "After all this, it is not an open question, as between a *bona fide* holder of the bonds and the township, whether all the prerequisites to their issue had been complied with. Apart from and beyond the reasonable presumption that the officers of the law, the township-officers, discharged their duty, the matter has passed into judgment."

The case of *United States* v. *Crusell,* 14 Wall. 4, turned wholly on the presumption that an officer had performed a certain act in the line of his duty, though there was no evidence whatever that he had.

"No principle can be better established by the authority of this court, than 'that the acts of an officer, to whom a public duty is assigned by his king, within the sphere of that duty, are *prima facie* taken to be within his power.' 'The principles on which it rests, are believed to be too deeply founded in law and reason ever to be successfully assailed. He who would controvert a grant executed by the lawful authority, with all the solemnities required by law, takes on himself the burden of showing that the officer has transcended the powers conferred upon him, or that the transaction is tainted with fraud.'"

Strother v. *Lucas*, 12, Peters, 438.

This same language is used by this Court in *United States* v. *Clarke*, 8 Peters 452, 453.

"A grant or a concession made by that officer, who who is by law authorized to make it, carries with it *prima facie* evidence that is within his power. No excess of them, or departure from them, is to be presumed."

Delassus v. *United States*, 9 Peters, 134.

In *United States* v. *Peralta*, 19 How. 347, this Court said: "We have frequently decided that 'the public acts of public officers, purporting to be exercised in an official capacity, and by public authority, shall not be presumed to be usurped, but that a legitimate authority had been previously given or subsequently ratified.'"

In *Bank of U. S.* v. *Dandridge*, 12 Wheaton, 70, this Court held that "persons acting publically, as officers of the corporation, are to be presumed rightfully in office; *acts done by the corporation, which presuppose the existence of other acts to make them legally operative, are presumptive proofs of the latter.*"

In *Cornett* v. *Williams*, 20 Wall. 250, this Court quoted the above language used in "*Bank of U. S.* v. *Dandridge*" with approval, and adds, "Here the Judge who made the order of sale was the Judge to approve the claim. *The order was presumptive proof of the requisite approval. Such approval was necessarily implied, and what is implied in a record, pleading, will, deed, or contract, is as effectual as what is expressed.*"

In *Carpenter* v. *Rannels*, 19, Wall. 146, it is held that, "an act done by a public officer which presupposes another act is presumptive proof of the latter."

In *McNitt* v. *Turner*, 16 Wall. 363, it is held that "acts done which presuppose the existence of other acts to make them legally operative are presumptive proof of the latter."

"Where the officers of the corporation openly exercise powers affecting the interests of third persons, which presuppose a delegated authority for the purpose, and other corporate acts subsequently performed show that the corporation must have contemplated the legal existence of such authority, the acts of such officers will be deemed rightful, and the delegated authority will be presumed."

Supervisors v. *Schenck*, 5 Wall. 782.

"When, therefore, they (the county officers) make a subscription and issue bonds in payment, it may fairly be presumed, in favor of an innocent purchaser of the bonds, that the condition which the law attached to the power has been fulfilled. To issue the bonds without the fulfillment of the precedent conditions would be a

misdemeanor, and it is to be presumed that public officers act rightfully."

Pendleton v. *Amy*, 13 Wall. 305.

"They (the county commissioners) were thus constituted a tribunal for the adjustment of all questions touching the subject. They were clothed with the power and charged with the duty to decide them. No appeal or rewiew was provided for. *Their issuing the bonds was the reflex and embodiment of their judgment, that it was proper to do so. It implies a prior determination to that effect.*"

Commissioners, etc., v. *January*, 94 U. S. 205, 206.

The authorities we have above cited in support of our second proposition illustrate its applicability to a great variety of cases. In no case is its applicability more apparent than in the case at bar. The Town officers are authorized to act upon the existence of certain conditions, but of the existence of those conditions they are made the *exclusive judges* as to third parties. The fact that they act presupposes the existence of the necessary conditions, and their own judicial determination as to the performance of such precedent conditions. The existence of these bonds,—the execution of which is averred,—implies everything precedent, and "what is implied in a record, pleading, will, deed or contract is as effectual as what is expressed."

Cornett v. *Williams*, *supra*.

In view of this long and unbroken line of decisions in support of our second proposition it must certainly be recognized as settled law no longer open to question.

III.

"WHEN A CORPORATION HAS POWER UNDER ANY CIRCUMSTANCES TO ISSUE NEGOTIABLE SECURITIES, THE BONA FIDE HOLDER HAS A RIGHT TO PRESUME THAT THEY WERE ISSUED UNDER THE CIRCUMSTANCES WHICH GIVE THE REQUISITE AUTHORITY, AND THAT THEY ARE NO MORE LIABLE TO BE IMPEACHED FOR ANY INFIRMITY IN THE HANDS OF SUCH A HOLDER THAN ANY OTHER COMMERCIAL PAPER."

City of Lexington v. *Butler*, 14 Wall. 296.
Gelpcke v. *City of Dubuque*, 1 Wall. 203.
Supervisors v. *Schenck*, 5 Wall. 784.
San Antonio v. *Mehaffy*, 96 U. S. 314.
County of Macon v. *Shores*, 97 U. S. 278, 279.

By the five decisions last above cited our third proposition is declared to be an established rule of law. The proposition is, therefore, itself an authority of the highest rank in its own support. It is sustained also by every authority cited in support of our second proposition. It is, indeed, an emphatic re-assertion of our second proposition in language precisely applicable to the class of cases to which the case now under consideration belongs. It is but an application of the familiar principles of law relating to officers and agents which were established long before municipal bonds were known. It applies the universal presumption in favor of the action of public officers to Town officers. Who can dispute the correctness of such an application? It applies the equally well known principle of agency that when the principal places it in the power of his agent to mis-lead, the principal and not the person mis-led,

must suffer for the agents acts. Who can gainsay the righteousness of such an application? The citizens of the Town of Covington, in voting for their Town officers, knew that they were choosing agents and officers who might be called upon to execute negotiable instruments, and who would, at the same time, be the *exclusive judges* of the existence of the circumstances authorizing such execution. They chose their officers; parties buying the bonds issued by them had no voice in such selection.

Mr. Justice Swayne, in *Merchants' National Bank* v. *State Bank*, 10 Wall. 604, said:

"Those who created the trust, appointed the trustee and clothed him with the powers that enabled him to mis-lead, if there were any mis-leading, ought to suffer rather than the other party."

With this rule of law we most heartily agree.

The case of *Farmers and Mechanics' Bank, etc.*, v. *The Butchers and Drovers' Bank*, 16 N. Y. 125, is instructive upon the principles here involved. In that case a Teller had certified checks when there were no funds on hand to meet them. Of course he had no authority to do so. Nevertheless, the Court in deciding the case says:

"It is conceded that every one taking the checks in question would be presumed to know that the teller had no authority to certify without funds. But this knowledge alone would not appraise him that the certificate was defective and unauthorized. To discover that, he must not only have notice of the limitations upon the powers of the teller, but of the extrinsic fact that the Bank had no funds; and as to this extrinsic fact, which he cannot justly be presumed to know, he may act upon

the representation of the agent. * * * Were he held bound to ascertain it, the teller would be the most direct and reliable source of knowledge, and he already has his written representation upon the face of the check."

So in the case at bar; every one taking these bonds was bound to know that the officers of the Town of Covington could rightfully issue them when the statutory conditions were fulfilled, because every purchaser of these bonds was bound to know what the statutes contain with reference to conferring powers upon incorporated Towns to issue negotiable securities. But this knowledge does not inform any one whether the conditions as set forth in the statutes have been complied with. To discover that he must have knowledge of the extrinsic facts, and as to them he may act upon and rely upon the representation of the officers of the Town. If he were bound to ascertain them, the Town officers would be the most direct and reliable source of knowledge, and he already has their representation that such conditions did exist, in the very fact that they have issued the bonds.

We now call attention to some further decisions of this Court, which most clearly assert the principle for which we are contending though not stating it *in haec verba* as the five decisions above cited do.

"If the contract can be valid under any circumstances, an innocent party in such a case has a right to presume their existence, and the corporation is estopped to deny them. * * *

The principle has become axiomatic in the law of

corporations, and by no tribunal has it been applied with more firmness and vigor than by this court."

Merchants' Bank v. *State Bank,* 10 Wall 644.

"If there be lawful authority for the municipality to issue its bonds, the omission of formalities and ceremonies, or the existenee of fraud on the part of the agents of the municipality issuing the bonds, cannot be urged against a *bona fide* holder seeking to enforce them."

Kenicott v. *The Supervisors,* 16 Wall. 464.

"Another answer to this ground of defence is, that the purchaser of the bonds had a right to assume that the vote of the county, which was made a condition to the grant of the power, had been obtained, *from the fact of the subscription, by the Board, to the stock of the railroad company, and the issuing of the bonds.*"

Commissioners of Knox Co. v. *Aspinwall,* 21 How. 545.

It will be observed that the *acts of the officers,* not the recitals of the bonds, are made the basis of the assumption.

"It is not denied that the relator was an innocent purchaser. In that event, if the bonds could have been properly issued under any circumstances, he had a right to presume they were so issued, and as against him the city is estopped to deny their validity."

The Mayor v. *Lord,* 9 Wall., 414.

In the case last cited it nowhere appears that there were any recitals in the bonds. Neither does it appear that there were any in the case of *Supervisors* v. *Schenck, supra,* and while there were some very brief recitals in

Gelpcke v, *Dubuque*, *supra*, they are not referred to by the Court in its opinion in any way whatever.

"A corporation, quite as much as an individual, is held to a careful adherence to truth in their dealings with mankind, and cannot, by their representations or *silence*, involve others in onerous engagements, and then defeat the calculations and claims their own conduct had superinduced."

Zabriskie v. *C. C. & C. R. R. Co.*, 23 How. 400.

This case is quoted and approved, and applied to a municipal corporation by this Court, in *Bissell* v. *City of Jeffersonville*, 24 How., 300.

In *De Voss* v. *Richmond* 18 Grattan, 338, the proposition for which we contend is approved and applied in its broadest sense to a case where the city was by the Court held to pay the same debt twice. The facts of the case are involved and the discussion lengthy, rendering it impossible to present the gist of the case in a reasonably brief quotation. We regard the case as a careful and valuable discussion of the principles here involved.

In view of these numerous and well considered authorities, it would seem impossible to question the correctness of our third proposition, but it was contested by defendant's counsel below, and we presume it will be in this Court. It is insisted that the proposition can only apply where there are recitals in the bonds, and an attempt is made to so limit the proposition by a reference to the facts of the case. But when it is considered that this proposition is announced as the law in several cases above cited as applicable to bonds which do not

appear to have contained any recitals, and in other cases is announced as an independent reason for the ruling, aside from any recitals, it is clear that no such limitation can be sustained.

There could certainly be no reason in holding that a recital in a bond that it was issued "according to," or "in pursuance of," a certain act, is conclusive evidence that the town trustees had passed upon all the prerequisities, but that the *act of issuing the bonds* is not such evidence.

The *act of the officers* in issuing the bonds speaks louder than any language they could have put into the bonds.

It would be a reproach to the law if it were not the rule, as distinctly stated by this Court in *Cornett* v. *Williams*, 20 Wall., 250, that "what is implied in a record, pleading, will, deed or contract, is as effectual as what is expressed.

IV.

THE Plaintiff IN ERROR, THE TOWN OF COVINGTON, Thomas Hopper CANNOT BE REQUIRED TO AVER OR PROVE THE PERFORMANCE OF ANY OF THE REQUISITES NECESSARY TO GIVE THE BONDS VALIDITY. THE WANT OF SUCH PERFORMANCE (IF ANY EXISTS) IS A MATTER OF DEFENCE.

"But we do not think that there was any defect in the declaration to be cured. We think that it would have been good on demurrer. The township had authority by law to issue its bonds by way of donation to a railroad. It did issue its bonds. They got into

circulation as commercial securities, and were purchased by the plaintiff. All the plaintiff had to do in case of non-payment was simply to sue on the bonds. If there was any defence to them by reason of want of performance of any of the requisites necessary to give them validity, or for any other cause, it was for the defendant to show it. A bond, especially a negotiable bond, is a *prima facie* obligation of the obligor, if he has capacity to make it; and is binding according to the terms and conditions apparent on its face until the contrary is shown. Whether an alleged defence, when set up is or not good against the particular holder, is to be determined by the Court in each case. How far, as against a *bona fide* holder, the obligor may, in any case, go behind the obligation itself, for the purpose of showing a failure to pursue the law authorizing its issue, is not yet, perhaps, clearly determined."

Lincoln v. *Iron Co.*, 103 U. S. 416.

"The second answer is, that if the county had, under the law, authority to issue bonds, and did issue them, and they went into circulation and came to the hands of a *bona fide* holder, he was not, in a suit upon them, required to aver or prove the performance of any of the requisites necessary to give them validity.

The want of such performance is a matter of defense, and the burden of proof is upon the county to establish it.

Lincoln v. *Iron Company*, 103 U. S. 412."

County of Clay v. *Society for Savings*, 104 U. S. 586.

"It is claimed that the contract is for the borrowing

of money, and that the complaint is bad, because it does not aver the sanction of two thirds of the electors of the city. If the fact were so, the consequence would not follow. If the city could make such a contract with that sanction, the sanction will be presumed until the contrary is shown. The non-existence of the fact is a matter of defence which must be shown by the defendant."

Gelpcke v. *Dubuque*, 1 Wall. 223.

Recitals in municipal bonds neither give to, nor take away from, such bonds their character as commercial securities governed by the law-merchant; they may, and often do, create an estoppel in favor of a *bona fide* holder. which would not exist but for the recitals, but they never create authority to issue such bonds, nor do they make the bonds when issued any more or less commercial securities governed by the law-merchant than they are without recitals.

Ackley School District v. *Hall*, 113 U. S. 139.
Dixon Co. v. *Field*, 111 U. S. 83.
Hayes v. *Holly Springs*, 114 U. S. 126.

Absolute lack of authority of law, upon the part of a municipal corporation, to issue commercial obligations for any purpose whatever, would be equally fatal to the bonds, whether they did or did not contain recitals, no matter how innocent a *bona fide* holder might be.

But in the case at bar it has been shown that the Town of Covington had full, lawful authority to issue commercial obligations for some purposes under some circumstances. The Town of Covington did issue these bonds. They are in form and character commercial obligations governed by the law-merchant.

The plaintiff is a *bona fide* purchaser for value before maturity. Hence the four propositions herein above presented, and supported by abundant authority, apply with full force to the case at bar.

If these four propositions are correct statements of the law,—it would seem that they can hardly be questioned,—it is plain that the rulings of the Circuit Court in sustaining defendant's demurrers, and in rendering judgment against the plaintiff, are erroneous and should be reversed.

V.

The fact that the Town of Covington paid the interest on these bonds for six years— while we do not claim that it works an estoppel in favor of plaintiff, or that it is, of itself, conclusive against the defendant— certainly is a circumstance entitled to much weight in the consideration of the case.

Defendant, by its counsel, seems to rely upon two points or propositions, which may be stated thus:

First: That the power to issue negotiable bonds is not inherent in a municipal corporation, and that if it exists in a given case, it must be exercised in the mode, and for the purpose, prescribed in the act giving the authority.

We might concede this proposition to be true as between first parties and all others chargeable with notice, either by recitals in the bonds, or otherwise. Further than that, we deny the proposition, because it is self-contradictory. If this proposition is to be applied in the broadest sense and meaning that can be given to

its words, it would mean that one dealing in such bonds must, at his peril, inquire and satisfy himself that the power has been exercised in the mode, and for the purpose prescribed in the act giving the authority, and this means, in plain English, that all bonds issued by municipal corporations under statutes containing conditions precedent, are *not negotiable*, for it is one of the qualities of negotiable paper that *no such inquiry need be made.* It puts a hypothesis of negotiable bonds, and couples with it a statement that they shall in fact be non-negotiable.

All that the buyer of these bonds, when he found them afloat upon the market as commercial obligations of the Town of Covington, was bound to inquire into, was simply this: Has the Town of Covington, Indiana, lawful authority to issue commercial obligations under any circumstances whatever? If he found that the statutes of Indiana did authorize the Town of Covington, under certain circumstances, to issue commercial obligations for certain purposes, and saw before him in the market for sale commercial obligations executed and issued by the proper officers of the Town of Covington, he had a right to buy the bonds, without further inquiry, as valid, legal and binding obligations of the town.

The second claim of defendant's counsel may be stated thus:

Second: That in an action upon the bonds of a municipal corporation, containing no recitals, the declaration must show authority in the corporation to issue the bonds sued upon and its exercise in the mode and upon the conditions prescribed by law.

This proposition we deny. It is but a disguised statement that there can be no such thing as negotiable bonds issued by a municipal corporation, unless they contain recitals. We have already seen, from authorities above cited, that recitals in municipal bonds neither add to, nor subtract from, the negotiable and commercial character of the bonds. This proposition is erroneous for the further reason that it wholy ignores the well established rules of law given, and supported by authority, in the propositions hereinabove set forth, to the effect that all parties not having actual knowledge of the facts have a right always to presume that public officers have acted in accordance with the law, and that where a corporation has power under any circumstances to issue negotiable securities, the *bona fide* holder has a right to presume that they were issued under the circumstances which give the requisite authority.

This proposition is erroneous for the still further reason that it seeks to require the plaintiff in his declaration to aver matters which, if they exist at all, are matters of defence, as has been shown by repeated decisions of this Court cited in support of our fourth proposition.

Many of the authorities cited by counsel for defendant seem to us to have but little, if any, bearing on the points in issue in the case at bar. They announce general principles and decide points, with regard to which we have no contention. We do not think any of them,—with perhaps three exception hereafter noticed,—conflict with the repeated decisions of this Court supporting the propositions we have, in this brief, advanced.

We call attention to a few of the cases cited by counsel for defendant for the purpose of showing that they do not conflict with the decisions of this Court cited by us, but are in full harmony with them.

The case of *City of Lafayette* v. *Cox* 5 Ind. 38, is cited. That was an injunction case to prevent the issue of bonds in aid of a railroad company, on the ground that the City had *no power* to issue bonds for such a purpose under any circumstances. There was no question of *bona fide* holder of bonds already issued and sold for value in the case. The Court held:

"The charter restrains the city authorities, in the general, to a certain rate of taxation; at the same time it authorizes the corporation to construct wharves, docks piers, basins, water works, works for lighting the city, & etc., undertakings which would involve an expense far beyond the amount of the annual revenues of the city, at the general rate of taxation; and it is in reference to these undertakings that we must construe the power mentioned for the creation of a debt. If the city contracts a debt beyond the annual revenues, at the general rate of taxation, the amount of which the council are allowed to anticipate, it must be for some of these specific purposes, and not for such undertakings as she has not been empowered to enter into. Of the correctness of this intrepretation we think there can be no doubt."

The only other decision of the Supreme Court of Indiana cited by defendant's counsel, to which we care to call attention, is the case of *Moon* v. *Commissioners*, 97 Ind. 176. In that case Moon was the County surveyor. The statute provided just what services he

should perform as surveyor, and fixed his compensation. He claimed to have performed certain services, *voluntarily*, without any contract with the Board, and *clear outside of his duties as surveyor as prescribed by law.* The commissioners rejected his claim. He brought suit. The Circuit Court decided against him. He appealed to the Supreme Court. In the decision it is held:

"A claim against a county for services can exist only where there is a contract, or where there is a statute providing for them and directing compensation. No person can voluntarily perform services for a county and demand compensation except in cases provided for by statute, and one who demands compensation for services rendered to a county must show a contract made under due authority of law with the proper officers, or else show a statute making provisions for such services. The right to a recovery is not made out by showing the beneficial character of the services, but the claimant must also show either a contract or a statute making provision for such services. It must also be made to appear in cases where a contract is relied on, that the contract was within the scope of the authority of the officers or agents who assumed to make it."

We certainly find no fault with this decision, but utterly fail to see where it has any application to any point in issue in the case at bar.

Marsh v. *Fulton*, 10 Wall. 676, is the only decision of this Court cited by counsel for defendant which is claimed as being directly in point upon the issues in the case at bar.

The facts of this case are peculiar. By the law of

Illinois the supervisors of the county exercised the county powers; one of which was to subscribe for stock in aid of railroad companies, provided a majority of the voters of the county voted such subscription. The notices of election were required to state the name of the railroad company in which stock was to be taken. In September, 1853, a majority of the voters voted to subscribe $75,000 to the Mississippi and Wabash Railroad Company. In 1854, and again in 1855, the Board ordered its Clerk to make the subscription *to that company*, but the Clerk of the County did not make the subscription as ordered. In 1857, by an act of the Illinois Legislature the Mississippi and Wabash Railroad Company was divided into three distinct corporations known as "Western", "Central" and "Eastern" divisions of the Mississippi and Wabash Railroad Company. After these new corporations had been created by the act of the Illinois Legislature, and at a time when the old Mississippi and Wabash Railroad Company had been legislated out of existence, without any election or order from the Board, the Clerk subscribed for $75,000 of stock in the Central Division, and issued bonds signed "John H. Piersol, Clerk of the County Court." This Clerk was "*a mere ministerial officer of the Board of Supervisors.*"

It will at once be seen:

1. That the bonds were not issued by the County officers.

2. That such issue by a mere ministerial officer could not be binding in the absence of actual authority, he not being the person to determine whether the prerequisities existed.

3. That there was no decision, either by recitals in the bonds, or by the fact of their issuance,—*because they were not issued by the officers whose duty it was to decide as to the performance of precedent conditions*,—that the requisites existed, since they were not issued by the persons who were to pass upon that question.

4. They were issued without any authority whatever.

It is in commenting on such a case that this Court used the language quoted by defendant's counsel in his brief. We submit that it is a very different case from that at bar, and has no reasonable application to any point here in issue.

The case of *Town of Coloma* v. *Eaves*, 92 U. S. 492, very plainly indicates the limitation of the above case in the manner we have suggested. In the decision this Court say:

"There is nothing in the case of *Marsh* v. *Fulton*, 10 Wall. 76, to which we have been referred, at all inconsistent with the rule thus asserted. In that case, there were no recitals in the bonds; *and there was no decision that the conditions precedent to a subscription, or to the gift of authority to subscribe, had been performed.* The question was, therefore, open."

But where the bonds were issued, as in the case at bar, by *the officers* charged with the duty of making the *decision*, the issuing of the bonds *implies* a decision, and such implied decision is as effectual as if expressed.

"As regards public officers, 'acts done which presuppose the existence of other acts to make them legally operative, are presumptive proofs of the latter. 'Facts

presumed are as effectually established as facts proved, where no presumption is allowed.'"

Cornett v. *Williams*, 20 Wall., 250.

Hence it seems plain that the case of *Marsh* v. *Fulton*, *supra*, cannot be held to conflict with the repeated decisions of this Court cited in support of our propositions.

In the case of *The Floyd Acceptances*, 7 Wall., 666, cited in the case of *Marsh* v. *Fulton*, supra, there was entire lack of statutory power. Had such statutory authority existed, to be exercised only on certain conditions to be ascertained by the officers, it is submitted that, under the decisions of this Court heretofore cited, the purchaser of such acceptances would have had the right to presume that the precedent conditions existed.

The only cases cited by counsel for defendant that may be claimed as in any degree in conflict with the numerous decisions of this Court cited by us, are *Kennard* v. *Cass Co.*, 3 Dillon, 148, *Thayer* v. *Montgomery Co.*, 3 Dillon, 390, and *Wallace* v. *Mayor of San Jose*, 29 Cal., 188.

In so far as these cases sustain defendant's proposition in support of which they are cited, they are certainly in direct conflict with many decisions of this Court we have herein cited—citation of which need not be here repeated. We shall not attempt to reconcile the conflict—if any exists—but cast in our lot with, and rely upon the decisions of, this Court.

The case of *Kennard* v. *Cass Co.*, *supra*, was a suit

on coupons detached from bonds issued by the County. In the decision Judge Dillon says:

"Where the maker is a county or other corporate body which has no inherent or general power to make such instruments and can make them only by virtue of special authority, the principles of pleading require that such authority should appear either by distinct averment of the special act conferring it, or by stating the recital of the bond in that respect."

That does not reach the point in issue in the case at bar. The laws of Indiana are, by requirement of the constitution, all general and of general application. The laws authorizing incorporated towns to contract debts and issue commercial obligations, are public acts, with full knowledge of which everybody is chargeable. The declaration in the case at bar avers the existence of such laws, and that these bonds were issued "pursuant to the laws of said State." Counsel for defendant contends that it is necessary to aver all the facts showing compliance with the preliminary steps made conditions precedent to the issuing of the bonds. This case does not so decide. This same Judge Dillon in *Railroad Co.* v. *Otoe Co.*, 1 Dillon, 288, where that precise point was in issue, held that it was *not necessary*, in the declaration, "to allege the election or other facts showing compliance with the preliminary steps on which the issue of the bonds was authorized."

In *Thayer* v. *Montgomery Co.*, *supra*, the bonds showed on their face that they were issued and made payable to a railroad company. The statutes of the State of Kansas only permitted counties to issue bonds to rail-

road companies for a single purpose, viz: in payment for subscription to capital stock for the purpose of aiding in construction. In overruling the demurrer to the declaration Mr. Justice Miller said: "I should have preferred that the petition here should have alleged that the bonds in suit were issued by the county in payment for stock subscribed by it in the railroad company."—Still, without such averments, he overruled the demurrer to the declaration.

In the case at the bar it has been shown that the Town of Covington possessed power by law to incur debt, and issue obligations to secure payment thereof, for various purposes. Under the act of June 11, 1852, *supra*, this could be done by petition of the "citizen owners of five-eights of the taxable property." Under the law approved May 15, 1869, *supra*, bonds could be issued by the Town, without petition, upon the report of the School Trustee of the Town.

These bonds, commercial obligations in form and character, were issued by the officers whose duty it was under the law to *decide* whether the circumstances had occured under which they might issue such bonds. The bonds contain no recitals. The declaration avers that the Town had lawful authority to issue such obligations, and that these bonds were issued "pursuant to the laws of said State regulating the execution of such negotiable commercial obligations by defendant." We submit that the case of *Thayer* v. *Montgomery Co.* cannot be justly held an authority in support of the proposition that the declaration in the case at bar is bad.

The case of *Wallace* v. *Mayor of San Jose*, *supra*,

has no feature in common with the case at bar. Under its charter the City of San Jose "had no power to create a debt upon the credit of the city, unless there was sufficient money on hand to meet the same, after paying the expenses of the government, and all other demands legally due." In other words; the City had *no power*, under any circumstances, to incur debts and issue its commercial obligations, to fall due in the future, as evidences of such indebtedness. The City entered into a contract with an Attorney by which it was agreed to give him fifty per cent. of the cash value of each of the lots or parcels of land the City might recover by means of his professional services. Before he had performed much service under his contract a new Board of municipal officers was elected. The new Board passed a resolution declaring the contract with this Attorney "a violation of good faith, justice, law, and equity, as also of the provisions of the City charter;" and declaring that they would not hold themselves, in their municipal capacity, bound by any of the conditions set forth in the contract.

The plaintiff brought the action on the contract set aside by the resolution of the Common Council. In the decision the Court say:

"The fact that these officers assumed to make the contract and thus bind the corporation, did not create the presumption that they possessed the power which they assumed to exercise, for no officer can acquire power or jurisdiction by the mere assertion of it."

With this statement of law we certainly have no contention. The City of San Jose had no power what-

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With this statement of law we certainly have no contention. The City of San Jose had no power what-

ever to create indebtedness and issue its commercial obligations therefor. It could only go in debt to the extent of surplus funds already on hand in the treasury. Everybody was bound to know that such was the law under which the city existed. There was no question whatever of a *bona fide* holder of commercial obligations issued by a municipal corporation having power to issue such obligations, in the case. Hence it cannot be claimed to be an authority in support of the proposition in aid of which it is cited. The attorney with whom the mayor and common council entered into the illegal contract was the party who brought the suit. The case does not fit any one of the propositions we have presented, nor does it touch any point in controversy in the suit at bar.

Quite a number of cases are cited by counsel for defendant in which there was an entire want of statutory power to issue the bonds sued upon. An instance of this class of cases so cited by defendant's counsel, is the case of *Township of East Oakland* v. *Skinner*, 94 U. S. 255. In this case there was an entire want of statutory power, and the bonds showed their invalidity on their face. The Court held:

"Where there is a total want of authority to issue municipal bonds, there can be no *bona fide* holding of them."

We do not question that statement of law.

The case of *Venice* v. *Murdock*, 92 U. S., 494, cited by counsel for defendant, is a strong authority in support of our propositions, and shows clearly the absurdity of attempting to hold that the bondholder must

prove that the requisite citizens' petition was duly signed and obtained prior to the issuing of the bonds. The case holds clearly that no such requirement can be made of the bondholder, and in so holding surely comports with reason and justice. Quite a number of authorities are cited by counsel for defendant in support of what may be put into a general proposition in the following form:

Dealers in municipal bonds are charged with notice of the laws of the State granting power to issue bonds. They also take the risk of the municipal bonds they find afloat on the market being genuine bonds signed and executed by the municipal officers authorized by law to issue them.

We do not deem it necessary to examine in detail the authorities cited by defendant's counsel in support of this proposition, because we make no contention against it. We do not doubt its correctness. The authorities cited in its support are in no degree in conflict with the authorities we have cited in support of the propositions advanced by us.

We ask that the judgment of the Circuit Court may be in all things reversed.

Respectfully submitted,

J. E. McDONALD,
JOHN M. BUTLER,
Counsel for Plaintiff in Error,
By JOHN M. BUTLER.

INDIANAPOLIS, IND., MARCH 23, 1886.

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SUPREME COURT

—OF THE—

UNITED STATES.

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No 540

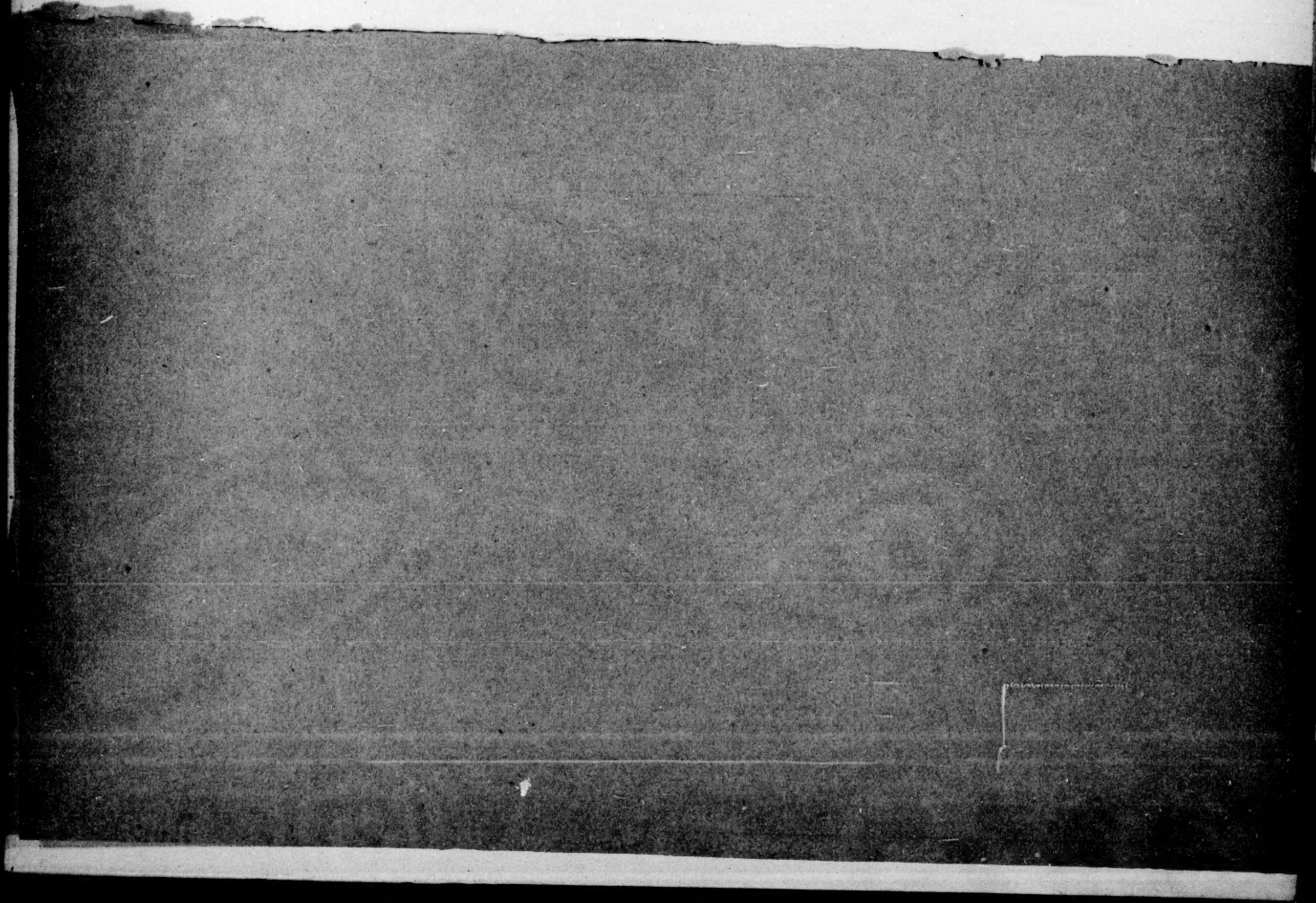
THOMAS HOPPER, PLAINTIFF IN ERROR.

VS.

THE TOWN OF COVINGTON, INDIANA.

BRIEF FOR DEFENDANT IN ERROR.

COVINGTON, IND.
C. H. GWYNN, PRINTER.
1886.



SUPREME COURT OF THE UNITED STATES.

THOMAS HOPPER, PLAINTIFF IN ERROR.

No. 49.

THE TOWN OF COVINGTON, INDIANA.

The plaintiff in error brought suit in the court below upon certain bonds and coupons alleged to have been made by the defendant. The complaint as originally filed consisted of three paragraphs:

Transcript pps. 1, 2, 3.

To these paragraphs a demurrer was sustained and leave was granted to amend.

Transcript p. 4.

On the 13th of December, 1881, the plaintiff filed an amended complaint.

Transcript, pps. 4 to 6.

This amended complaint was afterwards withdrawn.

Transcript, p. 10.

On the 24th day of February, 1882, the plaintiff filed "his amended and supplemental complaint" in two paragraphs.

Transcript, pps. 7 to 9.

The first paragraph counts upon certain bonds and the second upon certain coupons described. Copies of the bonds and coupons were made exhibits. Neither contain any recitals. To these paragraphs the defendant demurred for the following causes:

"1. That said complaint is insufficient in law to authorize the plaintiff to maintain his action.

2. That said complaint does not allege under what law or for what purpose the bonds and coupons sued on were issued.

3. That said complaint contains no allegation showing authority in defendant to make the bonds and coupons sued upon.

4. That said complaint states no cause of action against the defendant.

5. That the allegation in said complaint of power and authority in defendant to make the bonds and coupons in suit is an averment of a legal conclusion.

7. That said complaint does not state facts sufficient to constitute a cause of action against the defendant.

Transcript, p. 10.

It will be observed that there is no allegation in the complaint respecting the purpose for which the bonds and coupons were issued, or the authority under which they were made. There is an averment that the defendant had "full power and authority pursuant to the laws of" Indiana "to execute negotiable commercial paper," but this averment, besides being the statement of a legal conclusion does not go to the question of

authority to execute the particular bonds and coupons. The averment is not of an issuable fact. It is not made in traversable fo

Bean *vs* Beckwick, 1
Pumpelly *vs* Canal C
United States *vs* Am

Neither is the averment aided by the statement that the paper was issued "pursuant to the laws of said State." That is the pleader's conclusion from facts not averred. Perhaps the court would differ in its conclusion if the facts were given. It is one thing for the tribunal or body having power to decide, to say, after hearing the facts, that a thing was done pursuant to law, and quite another for a pleader to substitute such a conclusion in his pleading for the fact.

Whether the defendant had power to make the particular bonds could only be made to appear as a fact by proper averments respecting the purpose for which they were issued and the mode of their issue. The question whether the defendant had "full power and authority * * to execute negotiable commercial paper," is to be answered by the law, and whether it had the power to execute the bonds in suit, is to be determined by the law, after the facts respecting the manner and purpose of their issue are made known.

The Town of Covington is a municipal corporation, with its powers defined by the laws of the State of Indiana. In the absence of an averment that its powers are conferred by a special charter the presumption is that it is incorporated under the general Statutes.

Logansport *vs* Dick. 70 Ind. 65.

By Section 27, of the Act "for the incorporation of towns," R. S. of Indiana, 1852, vol, 1, p. 482; (R. S. 1881, Sec. 3342,) it is provided that: "No incorporated town under this Act shall have power to borrow money or incur any debt or liability, unless the citizen owners of five-eights of the taxable property of such town, as evidenced by the assessment roll of the preceding year, petition the Board of Trustees to contract such debt or loan. And such petition shall have attached thereto an affidavit verifying the genuineness of the signatures to the same. And for any debt contracted thereby, the Trustees shall add to the tax duplicate, of each year successively, a levy sufficient to pay the annual interest on such debt or loan, with an addition of not less than five cents on the hundred dollars, to create a sinking fund for the liquidation of the principal thereof." This was the only Statute authorizing a town to create a debt or make a loan until 1867, when an Act was passed giving authority to create an indebtedness for the purpose of building school houses. The latter act was amended in 1869, and, as amended, was in force at the date which the bonds in suit bear.

Section 1 of that Act was as follows:

SECTION 1. That any city or incorporated town in this State which shall, by the action of its school trustee or trustees, have purchased any ground and building, or buildings, or may hereafter purchase any ground and building, or buildings, or have commenced, or may hereafter commence the erection of any building or buildings for school purposes, or which shall have, by its school trustee or trustees, contracted any debts for the erection of such building or buildings, or the

purchase of such ground and building or buildings and such trustee or trustees shall not have the necessary means with which to complete such building or buildings, or to pay for the purchase of such ground and building or buildings, or pay such debt, may, on the filing by the school trustee or trustees of said city or incorporated town, of a report under oath, with the common council of such city, or the board of trustees of such incorporated town, showing the estimated or actual cost of any such ground and building or buildings, or the amount required to complete such building or build ings, or purchase such ground and building or build ings, or the amount of such debt, on the passage of an ordinance authorizing the same, by the common council of said city, or the board of trustees of such incorporated town, issue the bonds of such city or town to an amount not exceeding in the aggregate thirty thousand dollars, in denomination not less than one hundred nor more than one thousand dollars, and payable at any place that may be designated in the bonds, the principal in not less than one year nor more than twenty years after the date of such bonds, and the interest annually or semi-annually, as may be therein provided, to provide the means with which to complete such building or buildings, or to pay for the purchase of such ground and building or buildings, and to pay such debt; and such common council, or board of trustees, may, from time to time, negotiate and sell as many of such bonds as may be necessary for such purpose in any place, and for the best price that can be obtained therefor in cash; *Provided*, That such such bonds shall not be sold at a price less than ninety-four cents on the dollar.

Acts of 1869 p. 31 (R. S. Indiana, Davis Supplement, Vol. 3 p. 116.)

The remaining sections of the act provide for the disposition of the money when realized

and for the levying and collecting of taxes for its repayment.

In LaFayette *vs.* Cox, (5 Ind. 38) the Supreme Court of Indiana had decided, after the passage of the first statute quoted, and before the issue of the bonds in question, that the power to issue negotiable bonds could only be exercised by municipal corporations in Indiana for specific, legitimate and proper municipal purposes.

At the time the bonds in question were issued the two statutes mentioned, (Section 27 of the incorporating act and Section 1 of the Act of 1869,) were the only statutes that in any way authorized the creation of an indebtedness of the character indicated by the instruments in suit, by towns in Indiana. By Section 27 the creation of a debt was absolutely prohibited except in the way therein prescribed. The contention of the defendant is that in an action upon the bonds of a municipal corporation, containing no recitals, the complaint must show authority in the corporation to issue the bonds, and that in every case, where general authority in that behalf has not been conferred by law, the power of the corporation to issue the particular bond must appear. If the defendant had the power to issue the bonds in question it must be because that power had been conferred by some legislative enactment, or because it arose by necessary implication from some other power so conferred. "There must * * * be an original authority, by statute, to the municipality to issue the bonds. Municipal corporations have not the power, except through

special authority of the legislature, to issue corporate bonds which will bind their town;" * *.

Kenicott *vs.* Wayne Co., 16 Wall. 452.

And to know whether the power to issue *the* bonds existed we must first know the purpose for which they were issued.

"It is a general rule that a corporation can only act in the manner prescribed by law, * * *. The Act of incorporation is to them an enabling Act; it gives them all the power they possess;" * * *.

Head *vs.* Providence Ins. Co. 2, Cranch, 127.

Pearce *vs.* Railroad Co. 22 How. 441.

"No powers can be implied except such as are essential to the objects and purposes of the corporation as created and established."

Ottowa *vs.* Carey, 108 U. S. 110—114.

"The question whether a particular contract is binding on a municipal corporation or not is to be answered by determining whether, on a fair construction of its charter and legislation applicable thereto, it relates to matters connected with its corporate powers and duties."

Dillon on Corporations, 3 ed. Sec. 936.

The contract in question, in its external aspect, is not within the general powers of the defendant.

The Statutes of Indiana gave to the defendant no general power to issue negotiable bonds. "This is not a case where the party executing the instruments possessed a general capacity to contract."

Marsh *vs* Fulton, 10 Wall. 676.

The defendant's contention that the complaint in this case is defective is directly supported by the cases of Kennard *vs.* Cass Co., 3 Dillon 148, and Thayer *vs.* Montgomery, 3 Dillon 389, See Cotton *vs.* Inhabitants of New Providence, decided by the Supreme Court of New Jersey, reported in the Central Reporter, published by the Lawyers Co-operative Co. of Rochester, New York, in Vol. 1, No. 12, p. 444.

In an action on a contract alleged to have been made by a county board purporting to bind the county it was held that "It must be made to appear * * * that the contract was within the scope of the authority of the officers or agents who assumed to make it."

Moon *vs.* Board of Com's'rs. 97 Ind. 176.

When a contract purports to be made by a public agent "the public corporation is not bound unless it *manifestly* appears that the agent is acting within the scope of his authority."

Dillon on Corporations, 3, Ed., Sec. 445.

Until it is alleged in traversable form that such authority existed the authority does not appear. "In order to recover" it was necessary "for the plaintiff to prove that the bonds * * had been executed according to law."

Anthony *vs.* County of Jasper, 101 U. S. 697.

~~"Even a *bona fide* holder of the municipal bond is bound to show legislative authority in the issuing body to create the bond."~~

~~Hayes *vs.* Holly Springs, 114 U. S. 120.~~

In Scipio *vs.* Wright (11 Otto 665) it was said: "Of course it was incumbent upon him" (the plain-

tiff) "to prove that the town was authorized to create the instruments, and to dispose of them as it did."

In Scipio *vs.* Wright, as in all the cases I have met with, either the complaint contained averments or the bonds contained recitals as to the purpose for which the bonds were issued and as to the authority for their issue.

In suits upon municipal bonds the leading question has always been whether authority for their issue existed; and the *onus* as to this has always been placed on the plaintiff.

Venice *vs.* Murdock 2, Otto 494.

The validity of the contract depends upon the purpose for which it was made and whether the facts existed to confer the power to make it. Were the bonds in suit issued for school purposes under the Act of 1869; or were they issued for proper municipal purposes under Section 27 of the incorporating act; or were they issued as a donation to a railroad company, or for some other extraneous object? Until the facts respecting the purpose of their issue are made known it is, to say the least indifferent whether they are or are not valid obligations of the town. It was the duty of the plaintiff to show their validity.

Osborn *vs.* Bank of U. S. 9 Wheat. 825.

If the suit be against a party having a general capacity to contract, and the contract on its face is one recognized by law, its validity will be presumed; but if the party charged has no general capacity to make contracts, then the facts necessary to the validity of the particular contract must be averred. In all cases where capacity to

make a contract is limited the declaration should show that the particular contract was within the power of the party charged to execute.

A complaint against a married woman which discloses her coverture, and which does not aver facts showing the contract to be within the scope of her capacity is insufficient.

Broome *vs.* Taylor, 76 N. Y. 564.

Cupp *vs.* Cupp, S. C. Indiana; decided Oct. 8th, 1885, and unreported.

An illustration of the rule of pleading invoked by defendant is to be found in cases of suits upon the judgment of courts of inferior jurisdiction.

See Sheldon *vs.* Hopkins 7 Wend. 435.

The case of Martin *vs.* Kennard 3 Blackford 430, is in point. That was an action of debt upon a bond for prison bounds; and it was held that the declaration was defective because it failed to aver the existence of a judgment and a *capias ad satis faciendum*. The court said: "As the declaration shows the nature of the bond, it should also have shown the existence of a case in which its execution was authorized by Statute."

If there was no authority to issue the bonds in question there was an entire want of jurisdiction over the subject matter, and the town officers could not bind the town by any determination though it had been expressed directly by recitals in the bond. Where the statute does not authorize the issue of the bonds "there is an entire want of jurisdiction over the subject."

Township of East Oakland *vs.* Skinner 4 Otto, 255.

The town officers in this case were possessed of a special and limited jurisdiction and it was incumbent on the pleader to show that the act upon which he founds his cause of action was within their jurisdiction.

So far as it is made to appear in this case, there is nothing behind these bonds—neither ordinance, petition or statutory authority. It is not made to appear that the instruments in suit were issued in the exercise of any authority or for any purpose connected with corporation uses.

A condition precedent to the validity of these bonds is authority to make them. The existence of such authority is a constituent and indispensable part of the right of action in this case. There is not, I think, any case which, considered in the light of its facts, conflicts with the contention of the defendant on this point.

The case of the Township of Lincoln *vs.* Cambria Iron Company, 13 Otto 512, is not opposed to defendant's contention. The declaration in that case referred to the Statute and averred "that the defendant * * acting under and in accordance with the authority conferred by the Act, made certain donations to the railroad company, and *for that purpose* did make and execute the bonds in question." The decision was that where authority for the execution of the bond was made to appear the plaintiff need not go further and allege "performance of any of the requisites necessary to give them validity." It was not decided that it was unnecessary to allege sufficient facts to show that the bond was issued for an

authorized purpose, in a case where such facts did not appear by recital in the bond.

The statement that "All the plaintiff had to do was simply to sue on the bonds," was, evidently, not intended to mean that authority for making the bond need not have been shown. What is here said of the case mentioned will hold good with reference to any case where it is held that the production of the bond is *prima facie* sufficient to entitle the plaintiff to recover.

It is not without significance that in nearly all, if not quite all, the cases that have come to this court upon this subject, the facts respecting the purpose for which and the authority under which the bonds were issued have been made to appear in the plaintiff's complaint, either by direct averment or by recital in the bond sued on.

Neither is the defendant's contention in opposition to the case of Knox County *vs.* Aspinwall in the 21st of Howard, and the cases which have followed it. In all these cases it was made to appear that there was authority to issue the bonds upon certain conditions and for certain purposes, and they were issued by the proper officers, who had the power of determining whether the conditions had been complied with and whose decision that the statute had been followed was set forth on the face of the bonds.

It was contended by the plaintiff in error, in the court below, that the defendant's contention could not prevail in this case because the paper was negotiable in form and was in the hands of a holder for value; and that if a municipal corporation may, for some purposes, issue

negotiable paper, it is to be presumed in favor of one who buys the paper, that it was issued for a corporate purpose and under the circumstances which gave the requisite authority; and that the mere execution of the paper is to be taken as a decision that it is issued under authority of law, for a corporate purpose, and that all the conditions prescribed by law have been complied with. To support this contention the case of Gelpcke *vs.* Dubuque, 1 Wall. 172–220 was cited. It that case Mr. Justice Swayne said: "When a corporation has power under any circumstances, to issue negotiable securities, the bona fide holder has a right to presume they were issued under the circumstances which gave the requisite authority," * * *. In determining what was meant by this language it is necessary to look to the facts of the case in which it was used. The complaint in that case disclosed the purpose for which the bonds were issued and the authority for their issue, and, in the language of Justice Swayne, "The whole case" resolved "itself into a question of the power of the city to issue bonds for the purpose stated" in the complaint. It was not decided that the bonds were valid irrespective of the purpose for which they were issued.

The proposition that power to issue negotiable paper for some purposes is all that need be shown does not accord with the views often expressed by this court. In Anthony *vs.* County of Jasper (101 U. S. 697) it was said: "Dealers in municipal bonds are charged with notice of the laws of the state granting power to make *the* bonds they find on the market. This we have al-

ways held. In order to recover in this case it became necessary for the plaintiff to prove that *the bonds from which* the coupons were cut had been executed according to law." In Ogden *vs.* the County of Daviess, 102 U. S. (12 Otto)641, the court said: "We have always held that every holder of a municipal bond is chargeable with notice of the provisions of the law by which the issue of *his* bond was authorized. If there was no law for the issue there can be no valid bond."

In Wells *vs.* Pontotoc County, Chief Justice Waite said: "The controlling question in this case is, whether there was authority in law for issuing *the* bonds to which the coupons were attached. If there was not it has always been held that no recovery can be had in an action on the bonds or coupons."

12 Otto 625.

"Even a *bona fide* holder of a municipal bond is bound to show legislative authority in the issuing body to create the bond."

Hayes *vs.* Holly Springs 114 U. S. 120

How is this to be done? Manifestly not by the production of a legislative act authorizing the issue of a bond, for of such an act the court will take judicial notice; but by alleging and proving facts which bring the particular bond within the provisions of the law.

If the power to issue a negotiable bond for one purpose can be invoked to sustain it when issued for another purpose then all attempts to restrict such power is vain. On the contrary this court has always held that power to contract a debt and issue a bond for ordinary municipal

purposes will not support a bond issued for extraneous purposes.

Ottowa *vs.* Carey 108 U. S. 110.
Ottowa *vs.* Perkins 4 Otto 260.

It is not that the purchaser is only to inquire whether the law authorized the issue of any bond; he must inquire whether it authorized the issue of "his bond."

If the mere execution of the paper is to be taken as a declaration that there was authority for its issue, then the rule that the holder must "prove that the town was authorized to create" it, would be easily complied with, and the other rule established by the decisions of this court that the purchaser of such paper must inquire whether there was authority for its issue would be without meaning.

This court has constantly held that the duty to inquire as to the power to issue the bond he buys rests upon the purchaser. Nor can he rely upon recitals in this matter. The power must exist. "No *bona fides* can dispense with this, and no recital can excuse it."

Daviess Co. *vs.* Huidekoper 8 Otto 98.

"Recitals on the face of the bond or acts *in pais*, operating by way of estoppel, may cure irregularities in the execution of a statutory power, but they cannot create it."

Hayes *vs.* Holly Springs, *supra.*

There are no recitals in the bonds in this case and the "holder was bound to look to the

action of the officers of the" corporation "and ascertain whether the law had been so far followed as to justify the issue of the bonds."

Marsh *vs.* Fulton, *supra.*

Wallace *vs.* Mayor of San Jose, 29 Cal. 188.

To say that the mere execution of the bond is a decision that the power to issue it existed would be to extend the doctrine of this court further than has ever yet been done.

No case has gone beyond Knox County *vs.* Aspinwall 21 How. 539. One of the grounds for the decision in that case, was that where the power existed to issue the bonds, and jurisdiction to decide that the conditions precedent to the exercise of the power had been conferred upon the officers who were to issue them, their statement upon the face of the bonds that they were issued under and pursuant to the recited statute and for a purpose within the statute was a decision that the condition to the grant of power had been complied with.

The proposition asserted by that case cannot be stated more strongly in favor of the purchaser.

The proposition must rest upon the ground that a decision, by the tribunal appointed to decide the question, that the bonds had been issued under and pursuant to a recited statute, might be considered as a decision that they had been issued under the conditions prescribed and for the purposes contemplated by the statute. The conclusion of such a tribunal that the facts of the case brought it within the statute might be treat-

ed, in favor of an innocent purchaser, as an adjudication of the question. It would be supposed, of course, that the facts were known to the tribunal and were passed upon by it. After they had passed into judgment it would be unimportant to to inquire what the actual facts were.

The principle established by Knox County *vs.* Aspinwall was thus stated in The Town of Coloma *vs.* Eaves, (2 Otto 492): "Where legislative authority has been given a municipality, or to its officers, to subscribe for stock of a railroad company, and to issue municipal bonds in payment, but only on some precedent condition, such as a popular vote favoring the subscription, and where it may be gathered from the legislative enactment that the officers of the municipality were invested with power to decide whether the condition precedent has been complied with, their recital that it has been, made in the bonds issued by them and held by a *bona fide* purchaser, is conclusive of the fact, and binding upon the municipality, for the recital is itself a decision of the fact by the appointed tribunal."

See Dillon on Municipal Corporations, 2, Ed, Sec. 418.

Considered in any light the doctrine stated does not reach the question in this case. Here there is no legislative act recited and no decision that the bonds were issued "under and in pursuance" of any law.

I doubt whether a case can be found in this court where both the bond and the declaration

were silent as to the legislative act authorizing the issue and as to the purpose of the issue and the performance of conditions precedent.

If the mere execution of the bond is a decision that the power to issue it existed it would be safer to purchase municipal bonds without recitals than those containing recitals, for the absence of any recitals would indicate to the purchaser not only that the "circumstances which bring them within the power" existed, but also that the power itself existed.

If the mere execution of the bond is a decision that the power to execute it existed, then it must, under the repeated rulings of this court, be conclusive in favor of a *bona fide* purchaser. To decide that the power existed is to determine the whole question. It is to decide that the bond was issued for a proper purpose and that the necessary conditions precedent had been performed.

This court has held otherwise as to the effect of the execution of the bond without recitals.

In the absence of any recital there is "no decision that the condition precedent to subscription had been performed."

Town of Coloma *vs.* Eaves, *supra.*
Buchanan *vs.* Litchfield 12 Otto 278.

If sufficient facts were alleged to show that the defendant had capacity to execute the bond, then it might be said that a *prima facie* case was made. Such seems to have been the view of this court in Lincoln *vs.* Cambria Iron Co., *supra.* To

hold the declaration good in this case it is necessary to say that the mere execution of the bond indicates *prima facie* a capacity to make it. This would only be another form of saying that the defendant has a general capacity to execute negotiable bonds.

There is wanting an open and visible connection between the legislative authority in this case and the bonds in suit. The maxim *Omnia presumunter rite esse acta* will not supply the connection, for the presumption does not arise until it is first shown that the act in question was within the scope of the power and duty of the person acting.

Broom's Legal Maxims, 949, 950, 952.
Kobs *vs.* Minneapolis, 22 Minn, 159.

"Whatever intendments may have been made in favor of the" act "there is none in favor of the right to" act; and unless it is made to appear, in cases where the power to act is limited, that the matter in controversy was within the scope of the power it will be presumed to have been without it.

Smith's Leading Cases. 7 Am. Ed. Vol. 1, 1096, 1097.

Reference has been made to the uniformity in the course of pleading in cases of this sort. This is thought to be pertinent to the present inquiry, because the common opinion, indicated by this uniformity in pleading, entertained by the eminent lawyers whose learning and experience